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In the Supreme Court of the United States

OCTOBER TERM, 1974

RICHARD A. GORDON, ETC., PETITIONER

v.

NEW YORK STOCK EXCHANGE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

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OPINIONS BELOW

The opinion of the court of appeals (436a)[1] is reported at 498 F. 2d 1303. The opinion of the district court is reported at 366 F. Supp. 1261.[2]

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1974. The petition for a writ of certiorari was filed on September 19, 1974, and was granted on November 18, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

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[1] References to the Appendix filed by petitioner are designated "__a."

[2] The opinion of the district court does not appear in the Appendix filed by petitioner.

QUESTION PRESENTED

The Securities Exchange Act of 1934 (the "Exchange Act") was enacted, in large measure, to provide for the regulation and control of this nation's securities markets, which were found, as noted in Section 2 of the Act, to be "affected with a national public interest" which made it "necessary to make such regulation and control reasonably complete and effective."

The comprehensive regulatory scheme of the Act placed major emphasis on the stock exchanges, which were and are the principal markets for equity securities, providing for the regulation of such exchanges, and securities transactions executed on them, in a variety of ways, including direct regulation by the Commission, and the imposition upon the exchanges of obligations to the public, as well as self-regulatory duties, to be carried out under the supervision and direction of the Commission.

The Commission will discuss the question whether that scheme of regulation, by which the Commission establishes policy for the governance of this nation's securities markets, should be superseded and disrupted by collateral antitrust suits against exchanges subject to the Commission's plenary regulatory jurisdiction, thus calling upon federal district courts to make isolated policy judgments on vital aspects of complex regulatory issues for which the Commission has responsibility.

At issue in this case is a particular, although significant, exchange practice—the fixing of commission rates —which has existed for 180 years, was recognized and subjected to Commission control by the Congress, and is now in the last stages of being phased out as a part

of an on-going major restructuring of the securities markets under Commission direction and Congressional oversight for nearly 15 years.

STATUTES INVOLVED

The pertinent provisions of the Securities Exchange Act of 1934 and the Sherman Antitrust Act are set forth in the appendix, *infra,* pp. 84-93.

STATEMENT

Petitioner, Richard A. Gordon, instituted this private antitrust action in 1971 against respondents New York Stock Exchange, Inc. ("NYSE"), American Stock Exchange, Inc. ("AMEX"), and two "representative" member firms of these securities exchanges,[3] charging that the exchanges' practice of requiring their members to charge non-members a fixed minimum commission rate for the execution of transactions on the exchange was a price-fixing conspiracy in violation of the Sherman Act, 15 U.S.C. 1 and 2 (10a). As pointed out by the Department of Justice, (DOJ Br.6) the plaintiff made other claims which are not before this Court.

The suit, which was brought by petitioner on his own behalf and on behalf of a purported class of "small investors," sought both injunctive relief and treble damages in the amount of $1.5 billion.

I. THE DISTRICT COURT DECISION

On December 4, 1973, the district court granted respondents' motion for summary judgment and en-

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[3] The two member firms named as defendants in the complaint were respondents Merrill Lynch, Pierce, Fenner & Smith, Inc., and Bache & Co., Inc. Respondents NYSE and AMEX are national securities exchanges registered as such with the Commission pursuant to Section 6(d) of the Exchange Act, 15 U.S.C. 78f(d).

tered an order dismissing the action for lack of subject matter jurisdiction. 366 F. Supp. at 1267.

The district court ruled it lacked jurisdiction to entertain petitioner's antitrust attack on the defendant exchanges' fixed rate systems because "the practices complained of are within the exclusive jurisdiction of the Securities and Exchange Commission, that the SEC, acting pursuant to Section 19(b) of the Exchange Act . . ., has been actively regulating these practices, and that, consequently, the practices are exempt from the provisions of the antitrust laws . . . ." *Id.* at 1262-1263. The court held that "the fixing of commissions falls squarely within the congressional policy of exchange self-regulation embodied in the 1934 Act" and that "the power to fix commission rates" was placed "within the exclusive jurisdiction of the Exchange, subject to Commission supervision." *Id.* The district court therefore disagreed with the decision in *Thill Securities Corp.* v. *New York Stock Exchange,* 433 F. 2d 264 (C.A. 7), *certiorari denied,* 404 U.S. 994, insofar as *Thill* has been read as holding "that an antitrust court has concurrent jurisdiction with the SEC over *all* potentially anti-competitive practices and rules . . ." of a national securities exchange. *Id.* at 1267.

II. THE COURT OF APPEALS DECISION

On petitioner's appeal, the Commission and the Antitrust Division of the Department of Justice participated *amici curiae:* the Commission supporting the trial court's judgment, the Department of Justice urging reversal.

The Court of Appeals for the Second Circuit affirmed, stating that the requisite reconciliation between the antitrust laws and the scheme of regulation embodied in the Exchange Act must begin with an analysis of this Court's decision in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (439a). It reasoned that in *Silver* the enforcement of an exchange rule was held subject to antitrust scrutiny because of the absence of Commission authority to review the particular exchange conduct involved, and that this Court acknowledged in *Silver* that "if there were Commission jurisdiction to review a challenged [exchange] rule, a different case would arise concerning antitrust exemption" (437a-438a). The court of appeals concluded that this case was that "different case," since under Section 19(b)(9) of the Exchange Act, 15 U.S.C. 78s(b)(9), supervisory authority over the fixing of commission rates is expressly vested in the Commission (440a-441a).

Finding that the exercise of antitrust jurisdiction in *Silver* was deemed proper because, in the absence of Commission jurisdiction, the assertion of judicial oversight would not result in a conflict "between agency and court" and the denial of antitrust jurisdiction "would have left no governmental body to perform the antitrust function," the court of appeals held that the existence of Commission review power supported a finding of antitrust immunity for the challenged exchange practice of fixing commission rates (441a).

The court of appeals cited additional support for its ruling concerning antitrust exemption. First, referring to the test enunciated in *Silver* that repeal of the antitrust laws is to be implied only to the extent

"necessary to make the Securities Exchange Act work," the court construed that test as necessarily contemplating a "core of exchange self-regulation necessary to make the 1934 Act work, and thus immune from application of the antitrust laws" (447a). It determined from the language of Section 19(b) of the Act, 15 U.S.C. 78s(b), that Congress had defined in that section those matters which it considered "fundamental to achieving 'the aims of the Securities Exchange Act' . . . and accorded the SEC authority to make whatever changes respecting those matters as are 'necessary or appropriate' . . . to effectuate those aims. . . ." (442a). It therefore concluded that, if a core of exchange self-regulation exempt from the antitrust laws is to have any meaning, it must necessarily "have reference to the practices enumerated in Section 19(b) and in this instance to the fixing of reasonable rates of commission" (442a). The court reasoned that if the exchanges were subjected to "duplicative or inconsistent standards announced contemporaneously by courts and Commission" with respect to matters enumerated in Section 19(b), the "inevitable consequence" would be to "render ineffective the supervised self-regulatory scheme designed to accomplish the aims of the Exchange Act (442a).

Second, the court of appeals noted that Congress' grant to the exchanges of "unique self-regulatory power . . . was conditioned upon the creation of the SEC, invested with broad discretionary powers equal to the complex and changing nature of the problems arising in the securities industry" (443a). The court

of appeals stated: "[A]s to several specific matters inextricably linked with [the Act's purposes] . . . the Commission was empowered by Section 19(b) to order exchanges to make such amendments in their rules as the Commission found necessary to carry out the purposes of the Act" (443a). In this framework the court of appeals reasoned that the regulation of the practice of fixing commission rates, which was vested in the Commission seven years after the holding in *United States* v. *Trenton Potteries,* 273 U.S. 392, 398, that price fixing is a *per se* violation of the Sherman Act, evidenced Congress' view "that the exchange commission rate system bore crucially upon achievement of the goals of the 1934 Act" (444a).

In light of the Commission's jurisdiction to regulate exchange rate fixing and of the congressional view that exchange rate fixing was important to achievement of the Exchange Act's goals, the court below perceived "sound policy considerations governing regulation of the securities industry" which mandated "exemption from the antitrust laws with regard to fixing of minimum rates of commission" (445a). It recognized that effective regulation of this important practice would be "too hazardous with two hands on the tiller" (445a). And it emphasized that, in contrast to this Court's acknowledged inability to assess price-fixing practices under a rule of reason standard,[4] the Exchange Act "exhibits congressional confidence that the Commis-

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[4] Citing *United States* v. *Trenton Potteries, supra,* 273 U.S. at 398.

sion will be more capable of resolving problems of this nature" (450a).[5]

Finally, the court of appeals—after observing that "it would be difficult to maintain" that the effect of the rule challenged in the *Thill* case is in any significant respect different from the practice of commission rate-fixing—stated that "to the extent our decision today is inconsistent with *Thill,* we find ourselves constrained to disagree with the holding there announced" (450a-451a).

THE INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities Exchange Act of 1934 was enacted to provide "reasonably complete and effective" regulation and control of transactions in securities as . . . conducted upon securities exchange . . . markets" and of "practices and matters related thereto. . . ." Section 2 of the Act, 15 U.S.C. 78b. In establishing a scheme of regulation over the stock exchange mechanism, Congress recognized that the exchange markets were "affected with a national public interest" and constituted a principal cornerstone of the national economy. *Id.* It sought by the Act to restore and maintain investor confidence in the securities markets—confidence considered vital to the economic welfare of the country—through the enactment of provisions which would protect public investors, insure fair dealing in securities traded on exchanges and insure fair

[5] The Court below also stressed that its decision "by no means implies that Gordon at no time may have access to the courts" since judicial review of action by an administrative agency is otherwise available (451a; 498 F. 2d 1311).

administration of such exchanges. See S. Rep. No. 1455, 73d Cong., 2d Sess., p. 5; H.R. Rep. No. 1383, 73d Cong., 2d Sess., pp. 3, 5. Congress effectuated these purposes through a statutory scheme under which the Securities and Exchange Commission was vested with regulatory authority over exchange activities.

As the federal agency responsible for administering the Exchange Act, the Securities and Exchange Commission is vitally concerned that its continued ability to administer its congressional mandate and to formulate and effectuate a cohesive regulatory policy for the securities industry is not crippled through unwarranted application of antitrust standards and *ad hoc* judicial decrees affecting that regulatory program.

Resolution in this case of the question of pre-emption of the antitrust laws in favor of the Commission's jurisdiction will have a material impact upon the effective exercise by the Commission of its supervisory authority over securities exchanges, not just with respect to stock exchange commission rates, but also with respect to the entire range of exchange activities that are subject to the Commission's jurisdiction under the Exchange Act. *See, e.g., Stark* v. *New York Stock Exchange,* 346 F. Supp. 217 (S.D.N.Y.), *affirmed per curiam,* 466 F. 2d 743 (C.A. 2); *J. R. Williston & Beane* v. *Haack,* CCH Fed. Sec. L. Rep. [Current Binder] ¶94,921 (S.D.N.Y.).

INTRODUCTION AND SUMMARY OF ARGUMENT

A basic purpose of the Exchange Act is to provide for the regulation of the securities markets with particular emphasis on stock exchanges. As this Court pointed out in *Silver* v. *New York Stock Exchange Inc.,*

373 U.S. 341, stock exchanges "perform an important function in the economic life of this country" in that they serve as an indispensable mechanism through which corporate securities can be bought and sold. Prior to the enactment of the Exchange Act these markets were largely unregulated. As the exchanges grew in importance, the inadequacies of this approach and the necessity of subjecting them to a comprehensive scheme of federal regulation became more and more apparent and culminated in the enactment of the Securities Exchange Act of 1934. As this Court put it in *Silver,* 373 U.S. at 351:

> "It was, therefore, the combination of the enormous growth in the power and impact of exchanges in our economy, and their inability and unwillingness to curb abuses which had increasingly grave implications because of this growth, that moved Congress to enact the Securities Exchange Act of 1934."

The exchanges, as membership organizations, had traditionally engaged in regulating the activities of their members. The Exchange Act preserved this pattern of self-regulation, but provided to a substantial extent for supervision by the Commission. In certain crucial areas, the Congress did not rely primarily upon supervised self-regulation but either granted to the Commission direct regulatory authority, as in the case of manipulative and deceptive practices, short selling, insider trading, and other matters. In other essential areas, Congress vested in the Commission plenary authority to supervise and direct the self-regulatory activities of the exchanges through a unique scheme of

formal and informal procedures. Commission rates were in this latter category.

Since the *Silver* case involved exchange self-regulation beyond the jurisdiction of the Commission, this Court was not faced with a need to reconcile the objectives of the antitrust laws with the purposes of the Exchange Act in those areas where Congress did provide for Commission control. This Court carefully pointed out in that case, 373 U.S. at 360:

> "Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented."

As the court below noted, this is that different case. (440a-441a). The exchange practice of fixing commissions, which has existed since 1792, has obvious anticompetitive implications. On the other hand, until recently this practice has been deemed significant in the functioning of the exchanges, both in attracting members to the exchanges and in contributing to bringing orders to the exchange floor for execution by the auction process. Congress recognized the existence of fixed commissions but chose neither to outlaw that practice nor to endorse it, but rather to bring it under the complete control of the Commission.

In so doing, Congress recognized that the exchanges were dynamic and changing institutions that should not be frozen into a static statutory mold. Rather, Congress chose to grant broad discretion and authority to the supervisory administrative agency—the Commission—to adapt the exchange mechanism to changing needs.

The Commission has recently concluded that the traditional exchange mechanism, including the rigid rate structure, has proved ill-suited to the needs of a changing market influenced by the rise of institutional investors and modern technology. In response to these developments, the Commission has been implementing over the last decade a major restructuring of the securities markets, including, as one of its constituent elements, the phasing out of fixed minimum commissions. This program, along with numerous other changes, is designed, among other things, to prevent the elimination of fixed commissions from having the disastrous consequences which are feared by many.

The fundamental error of the Department of Justice is that it views this case not as one involving a unique regulatory scheme for a market, but as merely another in a long line of cases concerning the application of the antitrust laws to regulated companies and public utilities. The Department would therefore make the decision in this case turn upon the presence or absence of a "pervasive scheme" of "public utility type" rate regulation. But the principles set forth in *Silver* and other decisions of this Court for the reconciliation of the unique scheme of regulation of the securities markets and the antitrust laws cannot be so simply avoided and displaced by resort to a factor which is largely irrelevant. What is relevant here is not the standards and procedures by which the Commission considers the reasonableness of a particular rate, but rather whether the plenary jurisdiction of the Commission over exchange practices such as rate fixing which significantly affect the structure and functioning of these vital markets shall be displaced and disrupted by *ad hoc* anti-

trust suits.[24] *Silver* compels a finding of implied repeal of the antitrust laws in this case, since application of the antitrust laws to exchange rules subject to Commission supervision and review would conflict with the Commission's jurisdiction and render ineffective the Exchange Act's regulatory scheme.

The wisdom of Congress' grant of exclusive jurisdiction to the Commission to regulate the nation's stock exchanges and securities markets is illustrated by the public record of Commission regulation of the fixed commission rate system. That record of Commission supervision and review—which involves formulation and implementation of Commission regulatory policies through both the formal and informal procedures contemplated by the Act—discloses the complex and subtle economic issues concerning the stock exchanges' rate systems, and substantiates the necessity for leaving the regulation of exchanges and markets to the continuing and exclusive jurisdiction of the Commission.

ARGUMENT

I. The Securities Exchange Act Established a Comprehensive Scheme of Regulation of Securities Markets in which the Securities and Exchange Commission is Vested with Jurisdiction to Engage in Continuous Regulation of all Important Matters Respecting Stock Exchanges Including the Fixing of Commission Rates.

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[24] As we point out (pp. 38-39 *infra*), a person aggrieved by Commission action with respect to exchange rules which may be anticompetitive is entitled to judicial review otherwise than by collateral attack in an antitrust court.

A close analysis of the regulatory scheme created by the Exchange Act and the proper application of the principles governing reconciliation of the Exchange Act with other statutory regimes enunciated by this Court in *Silver* v. *New York Stock Exchange, Inc., supra,* 373 U.S. 341, and *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117, establish that, in order for that regulatory scheme to work, and thus for the congressional goals of the Act to be achieved, exchange conduct subject to the Commission's supervisory jurisdiction under the Act must be immunized from antitrust attack.

In *Silver* and *Ware,* as well as in other cases where the accommodation of the antitrust laws with a federal regulatory statute was to be resolved, this Court began the process of reconciliation with a searching inquiry into the genesis and aims of the federal regulatory act.[6] Thus, in order to resolve the issue of implied repeal of the antitrust laws presented in this case, we first examine the legislative history and framework of the Securities Exchange Act.

A. The Legislative History of the Act Evidences that Congress in 1934 Recognized that Securities Exchanges Possessed Anti-Competitive Features and Fashioned a Unique Scheme of Supervision by the Commission to Effect the Goals of the Act.

[6] See, *e.g., Federal Maritime Commission* v. *Seatrain Lines, Inc.,* 411 U.S. 726, 732, 736-739; *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 373-74; *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 218-220; *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 350-352; *United States* v. *Radio Corporation of America,* 358 U.S. 334, 339-346.

The Exchange Act grants to the Commission broad jurisdiction to regulate the operations of the nation's securities markets. The legislative history of the Exchange Act clearly evidences that in granting this regulatory jurisdiction to the Commission, Congress intended the Commission to possess a number of regulatory tools, including supervisory authority over the regulation of stock exchange operations so that its policy-making functions would be complete and effective. One of the features of exchange operations of which Congress was specifically aware in formulating the Exchange Act and which was purposely brought within the scope of the scheme of Commission regulation under the Act was the exchanges' practice of fixing minimum rates of commission.

While Congress considered regulating stock exchanges on several occasions during the three decades prior to 1934,[7] the immediate impetus to the adoption of the Exchange Act was the disclosure of serious instances of irresponsibility displayed by exchange members during 1929 and the early thirties.[8] Early in his first administration President Franklin Roosevelt directed the formation of a committee, under the chairmanship of Daniel C. Roper, then Secretary of Commerce, to study regulation of stock exchanges.[9]

[7] See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware, supra,* 414 U.S. at 128, n. 9; *see generally* R. De Bedts, *The New Deal's SEC; The Formative Years,* Ch. 1 (1964) [hereinafter cited as *"De Bedts"*].

[8] *De Bedts,* pp. 9-29.

[9] Letter from the President of the United States to the Chairman of the Senate Committee on Banking and Currency with an Accompanying Report Relative to Stock Exchange Regulation, 73d Cong., 2d Sess., p. iii (Committee Print) [hereinafter cited as *"Roper Report"*].

The report of this committee, the *Roper Report,* specified two major imperatives that should be adhered to in any scheme for federal regulation of the stock exchanges. The report first concluded that since stock exchanges "do not present a static situation susceptible to fixed standards" but rather present "a highly dynamic, ever changing picture, subject to untold and unknown possibilities and combinations that are today unpredictable," it would be inappropriate "to place this complex and important mechanism in a strait jacket." *Roper Report,* p. 6. Therefore, the committee stated, ". . . while certain provisions [to remedy abusive practices on the exchanges] might be included in any regulations, such provisions should not be the only power of correction left open to an administrative agency [regulating exchanges], but it should have broad discretion to operate directly on various abuses as the future may prove them to exist." *Id.*

The *Roper Report* further concluded, however, that it would be undesirable to "deprive" the exchanges "of initiative and responsibility" in dealing with their members. *Id.* at p. 8. Rather, in the opinion of the committee, it appeared "distinctly better" to hold an exchange "to a high degree of accountability for the conduct of members" in order to stimulate meaningful exchange regulation of its members.

Both of these imperatives were accorded recognition in the committee's recommendation for a system of federal licensing of securities exchanges whereby

> "all exchanges desiring a Federal license must adopt and submit to the proposed Stock Exchange Authority for its approval, rules designed to comply with the regulatory requirements outlined by the proposed statute and with such rules and regulations as may be promulgated by the proposed stock exchange authority thereunder. Furthermore, as a condition of retaining a license an exchange would be required to abide by and enforce such regulatory requirements and such rules and regulations. Any exchange would be permitted to adopt any other or additional rules and regulations not inconsistent with the regulatory requirements outlined by the statute or the rules and regulations promulgated by such proposed Stock Exchange Authority." *Roper Report,* p. 11.

Following publication of the *Roper Report,* legislation [10] was introduced in both the House and Senate,[11] which provided for the licensing and disciplining of securities exchanges, and vested broad discretionary authority in the regulatory agency over, in effect, the entire range of exchange operations (Doc. App. 1-8).[12] This grant of broad authority to the federal

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[10] For a description of the history of the drafting of the Exchange Act, see *De Bedts,* Ch. III.

[11] The Exchange Act was originally introduced as H.R. 7852, 73d Cong., 2d Sess. and S. 2693, 73d Cong., 2d Sess. Following extensive hearings, these bills were revised and reintroduced as H.R. 8720, 73d Cong., 2d Sess., H.R. 9323, 73d Cong., 2d Sess. and S. 3420, 73d Cong., 2d Sess. In amended form, H.R. 9323 and S. 3420 became the Securities Exchange Act.

[12] See H.R. 7852 and S. 2693, Sections 5 and 18(c); H.R. 8720, Sections 5 and 18. Pertinent sections of these bills, as well as other relevant publicly-available materials are set forth in the Documentary Appendix accompanying this brief. References to mate-

regulating agency contained in the early drafts of the legislation, received both support [13] and criticism [14] during the congressional hearings held on these bills. The principal criticism raised was that these bills would impose greater federal regulation of the exchanges than had been contemplated in the *Roper Report,* providing for what one critic characterized as "not regulation but domination." [15] In fact, the drafters of the legislation acknowledged that they had struck a different balance with respect to the extent the federal agency would be empowered to take the regulatory initiative than had the *Roper Report,*[16] since the bills would give the Commission power "to step in and prescribe the rules under which the exchange shall operate in practically all particulars . . . ." [17] This regulatory scheme was justified, it was argued, on the ground that it was

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rial contained in the Documentary Appendix are cited as ("Doc. App. ").

[13] See Hearings Before the Senate Committee on Banking and Currency on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.), 73d Cong., 1st and 2d Sess. [hereinafter cited as "Senate Hearings"], pp. 6868 (Statement of Herman Kinnicutt, member of Investment Bankers Association, New York, N.Y.), 7256 (Statement of A. Verle Shaw).

[14] See Hearing before the House Committee on Interstate and Foreign Commerce on H.R. 7852 and H.R. 8720, 73d Cong., 2d Sess. [hereinafter cited as "House Hearings"], p. 227 (Statement of Richard Whitney, President of the New York Stock Exchange); Senate Hearings, pp. 6638-39 (Statement of Richard Whitney, President of the New York Stock Exchange), 6901-6915 (Statement of Frank R. Hope, President of the Association of Stock Exchange Firms).

[15] See Senate Hearings, pp. 6638-39; House Hearings, p. 227.

[16] See House Hearings, pp. 26-27 (Statement of Hon. H. M. Landis, Commissioner, Federal Trade Commission).

[17] Senate Hearings, p. 6566 (Statement of Thomas G. Corcoran).

necessary to empower the Commission to step in, in the event the Commission finds the method of operation being undertaken by the exchange unsatisfactory to it and to this end the Commission should have a power of intervention short of revoking an exchange's license.[18]

It was in this context—a debate on the proper balance that ought to be struck—that the Congress specifically focused on the fact that the stock exchanges had anti-competitive features and that any federal regulation of the exchanges should involve regulation of these features, including in particular, the exchanges' practices of fixing minimum commission rates. Thus, the practice of fixing minimum commission rates was described in the congressional hearings,[19] and the ap-

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[18] Senate Hearings, pp. 6566-6570 (Statement of Thomas G. Corcoran).

[19] See Senate Hearings, pp. 6075, 6080; House Hearings, pp. 320-321, 423.

The practice of fixing commission rates on stock exchanges in the United States is generally traced back to the so-called Buttonwood Tree Agreement of 1792. *See* Eames, The New York Stock Exchange, p. 14 (1894).

In 1912 and 1913, a subcommittee of the House Committee on Banking and Currency, 62d Congress, made an extensive investigation of stock exchange operations. The resulting report of this committee—H.R. Rep. No. 1593, 62d Cong., 3d Sess., known as the *Pujo Report* after the Chairman of the subcommittee—specifically dealt with the NYSE's practice of commission rate fixing, noting that:

> "The rule is rigidly enforced by suspension from one to five years for a first violation and expulsion for a second. . . . The acknowledged object is to prevent competition amongst the members."

Pujo Report, p. 39. The *Pujo Report* advised against any congressional action proscribing this practice because, *inter alia,* the subcommittee believed

propriateness of federal regulation of the exchanges' fixed rate system was the subject of discussion during those hearings.[20] For example, one of the leading authorities of the time on stock exchange operations,

"the present rates to be reasonable, except as to stocks, say, of $25 or less in value, and that *the exchange should be protected* in this respect . . . *against a kind of competition between members that would lower the service and threaten the responsibility of members. A very low or competitive commission rate would also promote speculation and destroy the value of membership.*"

Pujo Report, pp. 115-116 (emphasis added).

The conventional wisdom concerning the propriety of the fixed commission rate system was the same at the time of the enactment of the Securities Exchange Act. Thus, a comprehensive study of the operations of the exchange market published in 1935 made the following observation with respect to the fixed rate system:

"Among the provisions [of the NYSE's rules and constitution] specifically regulating the brokers in their relations with each other, there is the requirement of *minimum commission charges. This serves the double purpose of making unfair competition among brokers punishable and of providing better and cheaper service to the public.* The prohibition against splitting commissions has served to do away, in part at least, with unnecessary middlemen who are beyond the control of the Exchange. It has also kept the larger part of the brokerage business in the hands of the brokers rather than permitting it to drift into the hands of banks."

The Twentieth Century Fund, Inc., *The Security Markets*, p. 226 (1935) (emphasis added).

An earlier publication of the Twentieth Century Fund's findings, Twentieth Century Fund, *Stock Market Control* (1934), was repeatedly relied upon in the drafting and consideration of the Securities Exchange Act. See, *e.g.*, Senate Hearings, p. 6467; 78 Cong. Rec. 8031-8032 (remarks of Mr. Pettengill), 8180 (remarks of Senator Fletcher), 8395 (remarks of Senator Barkley).

[20] *Compare* Senate Hearings, p. 6868 (where the witness recommended against giving the federal regulatory agency "control over commission charges" on the ground that such control "must be left as [a matter] of self-preservation to the exchanges and their members") *with id.*, p. 7705.

Samuel Untermeyer, who was chief counsel to the Congressional committee which wrote the *Pujo Report* (discussed note 19 *supra*) made the following recommendations with respect to stock exchange rate fixing:

"While section . . . [18] of your bill [S. 2693] would give the . . . Commission the right to prescribe uniform rates of commission, it does not otherwise authorize the Commission to fix rates, which it seems to me it should do and would do by striking out the word 'uniform.' *That would permit the Commission to fix rates.*

"The volume of the business transacted on the exchange has increased manyfold. Great fortunes have been made by brokers through this monopoly. The public has no access to the exchange by way of membership except by buying a seat and paying a very large sum for it. Therefore it is a monopoly. Probably it has to be something of a monopoly. But after all it is essentially a public institution. It is the greatest financial agency in the world, and should be not only controlled by the public but *it seems to me its membership and the commission charged should either be fixed by some governmental authority or be supervised by such authority.* As matters now stand the exchange can charge all that the traffic will bear, and that is a burden upon commerce."

Senate Hearings, p. 7705 (emphasis added). The bill as enacted deleted the word "uniform" as Mr. Untermeyer suggested, and substituted the word "reasona-

ble." *See,* H.R. Rep. 1838, 73d Cong., 2d Sess., p. 19 (Conference Report).

The original bills were revised in response to the criticisms and suggestions made in the hearings so that the legislation, as reported out of the respective House and Senate committees,[21] struck a balance somewhat more akin to the position expressed in the *Roper Report* than was the position contained in the initial version of the bills by leaving with the exchanges in the first instance the responsibility to establish rules governing their operations but nevertheless subjecting the exchanges to the continuous authority of a federal regulatory agency.

Nevertheless, Congress emphasized that this grant of self-regulatory responsibility was to be subject to the continuous plenary jurisdiction of the Commission. As the House report explained, "the bill gives the Commission broad powers over the exchanges to insure their efficient and honest functioning" because as economic forces affecting speculation converge "upon the exchanges, the control of the exchange mechanism is a necessary part of any effective regulation." H.R. Rep. 1383, *supra,* at p. 14.[22] To aid these powers, exchanges seeking registration were required to agree that they would continuously furnish "the

[21] H.R. 9323, 73d Cong., 2d Sess. and S. 3420, 73d Cong., 2d Sess.

[22] One of the basic purposes of the Exchange Act was the establishment of "an efficient, adequate, open and free market for the purchase and sale of securities. . . ." (78 Cong. Rec. 8162 (remarks of Senator Fletcher)) and control of the exchange mechanism was regarded as essential to achieving that purpose. See 78 Cong. Rec. 7862 (remarks of Mr. Lea), 7864 (remarks of Mr. Wolverton), 8161, 8163 (remarks of Senator Fletcher).

Commission with complete information concerning [their] . . . organization, membership, and rules." S. Rep. No. 792, 73d Cong, 2d Sess., p. 15. And, as the House Report further explained, "if the rules of the exchange in *any important matter* are not appropriate to insure fair dealing, [the Commission is empowered] to order such changes in the rules after due notice and hearings, as it may deem necessary." H.R. Rep. No. 1383, *supra,* at p. 15 (emphasis added).

The sponsors of the legislation pointed out that it was necessary throughout the bill to vest "broad discretionary powers" in the Commission because of the "complicated nature of the problems" dealt with in the bill, and because the bill regulated a "field where practices constantly vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means." H.R. Rep. No. 1383, *supra,* at pp. 6-7. And the powers specifically granted the Commission over exchange rules were characterized as "quasi-legislative."[23]

The floor debates on H.R. 9323 and S. 3420 focused on the nature and consequences of the broad supervisory power that these bills would, if enacted, grant the Commission over the exchanges' rules. In the House, concern centered around what is now Section 19(b) of the Act (then Section 18(b), H.R. 9323), which empowered the Commission to act by rulemaking to amend or alter the rules of an exchange, and the fact that the bill did not provide for direct appellate review of such Commission action. 78 Cong. Rec.

[23] 78 Cong. Rec. 8091 (remarks of Mr. Lea); see also 78 Cong. Rec. 7696 (remarks of Mr. Rayburn), 7862 (remarks of Mr. Lea).

8087-8093. In arguing that a procedure should have been provided for judicial review of Commission action altering or amending exchange rules, certain members of the House stressed, among other things, that the bill as drafted gave the Commission unreviewable authority to fix commission rates at levels which could, for example, be set so low as to put exchange members out of business.[24]

During debate in the Senate, the bill was criticized as granting the Commission authority over exchanges that exceeded that necessary to achieve what some Senators perceived as the bill's underlying purpose of curbing dishonest and economically harmful manipulative and speculative practices in connection with trading in securities.[25] An amendment was offered by Senator Hastings of Delaware on the Senate floor to what is now Section 19(b) of the Exchange Act, that would have struck from that section of the bill the enumerated matters presently subject to the Commission's jurisdiction under Section 19(b), and instead would have limited the Commission, by order, to alter or supplement the rules of an exchange to prevent "excessive credit for speculation and . . . unfair practices on stock exchanges." 78 Cong. Rec. 8592. Senator Hastings explained that in his view Section 19(b) went too far in empowering the Commission "to regulate the internal operations of exchanges in many matters which do not bear, either directly or even remotely

[24] See 78 Cong. Rec. 8091 (remarks of Mr. Pettengill and Mr. Wadsworth), 8092 (remarks of Mr. Dondero).

[25] See 78 Cong. Rec. 8283 (remarks of Senator Walcott), 8591-92 (remarks of Senators Hastings and Copeland).

upon the control of credit or unfair practices in the purchase and sale of securities." 78 Cong. Rec. 8592. One of the matters of internal operations specifically pointed to was the fixing of commission rates.[26] *Id.*

In support of the Hastings amendment, Senator Copeland of New York argued that "the brokerage business is not a public utility" and therefore that it would be inappropriate to regulate the exchanges like a public utility through the fixing of commission rates. *Id.* Because of a "determination" in the Congress "to turn over the stock exchange and its whole operation to a commission of the Federal Government," Senator Hastings predicted that the amendment would not be adopted and, in fact, the amendment was rejected. *Id.*

While various provisions of the legislation were modified in some respects prior to passage of the Act,[27] the basic regulatory scheme described above was enacted.

In view of the foregoing discussion, we fail to understand how the Department of Justice [28] can contend that

[26] Similarly, Senator Hastings had previously observed during the floor debates that

> "there is the distinct and definite provision that the proposed commission may fix the rates of commission which the stock exchange members may charge for the services they render. They cannot by rule and regulation govern it any longer. They cannot by rule and regulation fix it at an amount which they believe will return to them a fair amount of money annually, or that will increase their business. They may not use their judgment about it any longer. It passes to the commission." 78 Cong. Rec. 8490.

[27] See, *e.g.*, H.R. Rep. 1838, *supra*, at p. 37.

[28] References to pages of the Brief for the United States As Amicus Curiae, which has been filed by the Solicitor General on

Mr. Untermeyer's testimony was the "only reference to fixed commission rates of any significance" in the legislative history of the Exchange Act (DOJ Br. 30) and that there is "nothing in the history . . . [of the Exchange Act that] reflects a purpose by Congress to endorse" the practice of fixing minimum commission rates (DOJ Br. 53). The legislative history, as the court below noted (451a), clearly reveals that Congress in 1934 viewed the fixed rate practice as a "keystone" of the exchanges' organization. Moreover, there is further exhibited in the Exchange Act's history the deliberate determination by the Congress not to leave unregulated the anti-competitive aspects of exchange operations, but rather to subject all important matters, including the practice of exchange rate-fixing, to the jurisdiction of the Commission. Thus, Congress adopted Mr. Untermeyer's recommendation to provide the Commission with plenary authority over the exchange's anti-competitive practice of fixing rates (see pp. 21-22, *supra*). And it did so in the context of the apparent endorsement of the exchanges' rate fixing practices by the Pujo Committee, to which Mr. Untermeyer was chief counsel, and in the context of the conventional wisdom in 1934 that such practices were desirable.[29] In addition, in rejecting the Hastings amendment, (see pp. 24-25, *supra*), Congress manifested its intention that the authority granted to the Commission in Section 19(b) to alter or supplement ex-

behalf of the Department of Justice, are cited as "DOJ Br. . . . ." Arguments set forth in that brief are referred to as those of "the Department of Justice."

[29] See note 19 *supra*.

change rules, where "such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange," should go beyond the mere prevention of fraudulent and manipulative practices on the exchanges and should authorize the Commission to supervise the exchange mechanism with respect to all important matters—including the fixing of commission rates.[30]

The conclusion drawn from the Exchange Act's history, that Congress intended to superimpose a scheme of regulation over entities it knew to have anti-competitive features, is in no way mitigated by amendments to the Exchange Act in 1936 and 1938, as the Department of Justice asserts (DOJ Br. 32-35). Thus, while the 74th Congress in 1936 did amend the Exchange Act by adding Section 12(f) to the Act, 15 U.S.C. 78l(f), to permit trading of unlisted securities on exchanges and thereby "create a fair field of competition among exchanges and between exchanges as a group and the over-the-counter markets" (S. Rep. No. 1739, 74th Cong., 2d Sess., p. 3), Congress specifically

[30] The Department of Justice appears to have abandoned its essentially unsupported assertion advanced in the court below that the power of the Commission in Section 19(b)(9) was intended to be limited solely to setting maximum commission rates in order to protect investors from exhorbitant charges. Brief for the United States as Amicus Curiae, *Gordon* v. *New York Stock Exchange*, C.A. 2, No. 74-1043, at p. 26. Certainly, in view of the exchanges' practice of fixing minimum commission rates, dating back to 1792, an intention to exclude fixed *minimum* commissions from the Commission's supervisory jurisdiction would have been expressed in clear and unequivocal terms.

explained that the purpose of the amendment was "to allow each type of market to develop in accordance with its natural genius and consistently with the public interest." *Id.* This reference to the "natural genius" of each type of market reflects Congress' awareness of the distinction between the competitive over-the-counter market on the one hand and the exchange markets which it had subjected to regulation in 1934.

Congress' awareness of this distinction is more clearly revealed in connection with the 1938 Maloney Act Amendments to the Exchange Act which, contrary to the Department of Justice's contentions, do not support the view that Congress intended the antitrust laws to apply to exchange practices subject to the Commission's jurisdiction (DOJ Br. 35). The Maloney Act provided for self-regulation of the over-the-counter market through the establishment of associations of over-the-counter market dealers—associations not yet in existence when the Act was passed. In creating this regulatory scheme, Congress recognized that self-regulatory associations could have an anti-competitive effect on the then existing "free and open" nature of the over-the-counter market. H.R. Rep. No. 2307, 75th Cong., 3d Sess., p. 8. The proponents of the Maloney Act noted that, in contrast to the over-the-counter market, stock exchanges "had certain features that may be regarded as monopolistic because of their exclusive nature," and explained that the Exchange Act represented "an attempt to bring those practices under control." Hearings before the Senate Committee on Banking and Currency on S. 3255, 75th Cong., 3d Sess., p. 7. Since the over-the-counter market lacked any

anti-competitive aspects, Congress made clear in the Maloney Act that the activities of registered associations were "to be consistent with the operation of free and open markets." H.R. Rep. No. 2307, *supra,* at p. 8. But the Exchange Act did not attempt to turn stock exchanges into free and open markets; rather it sanctioned the anti-competitive features of the exchange markets subject to the Commission's jurisdiction.

Finally, the Department of Justice refers to the enactment by Congress in 1934 of the Communications Act which provided an express antitrust exemption for telephone company mergers approved by the Federal Communications Commission (DOJ Br. 31, n.17). It is contended that the inclusion of this express exemption in that act, which was being considered about the same time as the Exchange Act, compels the conclusion that the absence of an express exemption in the Exchange Act requires application of the antitrust laws to matters subject to the Commission's jurisdiction under Section 19(b). But, as the Department of Justice itself has asserted (DOJ Br. 47-48), it is likely that Congress in 1934 did not think that the Sherman Act applied to exchange practices, and thus would have had no reason to provide for an express exemption. Also unfounded is the alternative assertion that, because Congress did not expressly consider the antitrust laws when formulating the Exchange Act, this Court cannot now find an implied repeal of those laws with respect to matters subject to the Commission's jurisdiction. The existence of antitrust immunity is not dependent upon whether Congress specifically intended to exempt exchange practices subject to Com-

mission jurisdiction from antitrust attack. Indeed, if as the Department of Justice asserts (DOJ Br. 47), the question of implied repeal depends simply on finding a conscious congressional intention to exempt regulated activity from the antitrust laws, it is difficult to understand why this Court has on so many occasions engaged in exhaustive analyses of other regulatory schemes in determining whether to find an implied repeal. See *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439; *United States* v. *Radio Corporation of America*, 358 U.S. 334; *California* v. *Federal Power Commission*, 369 U.S. 482; *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296; *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213; *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 237; *Otter Tail Power Co.* v. *United States*, 410 U.S. 366. As we shall show *infra*, implied repeal of the antitrust laws arises here because the statutory scheme in the Exchange Act simply will not work as Congress intended if exchange conduct subject to the Commission's jurisdiction may be challenged under the antitrust laws.

B. The Exchange Act on Its Face Confers Jurisdiction on the Commission to Regulate Stock Exchanges With Respect to all Important Matters.

The Commission was given responsibilities under the Exchange Act with respect to numerous activities affecting securities markets. Thus the Commission is empowered to define and prohibit such matters as manipulation and deceptive practices (see Sections 9 and 10 of the Act, 15 U.S.C. 78i and 78j); to require

brokers and dealers to meet adequate financial standards (see Sections 8 and 15(c)(3) of the Act, 15 U.S.C. 78h and 78o(c)(3)); to set standards for the utilization of exchange membership; and to regulate exchange specialists and floor traders (see Section 11 of the Act, 15 U.S.C. 78k). Further to implement the Commission's regulation of exchanges, Congress also provided in Section 6 of the Act, 15 U.S.C. 78f, for the registration of securities exchanges with the Commission.[31] Section 6(a), 15 U.S.C. 78f(a), provides, as a prerequisite to registration, that the registration statement filed by the exchange contain, *inter alia*, "[a]n agreement . . . to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of" the Exchange Act and the Commission's rules and regulations thereunder. Furthermore, under Section 6(d), 15 U.S.C. 78f(d), the Commission, before granting an application for registration, must find that an exchange is "so organized as to be able to comply with the provisions of" the Act and that its rules "are just and adequate to insure fair dealing and to protect investors."

Congress next provided, through Section 19(a) of the Act, 15 U.S.C. 78s(a), that the Commission be vested with jurisdiction to assure compliance by registered exchanges with their duties under the Act. Section 19(a)(1), 15 U.S.C. 78s(a)(1), authorizes the Commission to discipline an exchange within specified limits for violating the Act or any rules thereunder, or

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[31] Section 5 of the Act, 15 U.S.C. 78e, makes it unlawful, except in certain cases not relevant here, to effect any securities transaction on an unregistered exchange.

for failing "to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon."[32] And pursuant to Section 19(a)(2), 15 U.S.C. 78s(a)(2), the Commission may discipline members and officers of registered exchanges.

Finally, and most important, in Section 19(b) of the Act Congress conferred plenary powers upon the Commission to supervise and oversee the nature and structure of particular exchanges and exchanges generally. Under Section 19(b), if the Commission, after following prescribed procedures, determines that changes in an exchange's rules are

> "necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange [it may] by rules or regulations or by order . . . alter or supplement the rules of such exchange"

with respect to "such matters as" twelve broadly enumerated subjects and "similar matters." One of the matters *specifically* enumerated—in Section 19(b)(9)

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[32] The Commission has, pursuant to Section 19(a)(1), withdrawn the registration of a national securities exchange which, among other things, violated the Exchange Act and failed to enforce compliance with the Act and with the exchange's own rules by members and issuers of listed securities. *San Francisco Mining Exchange*, Securities Exchange Act Release No. 7870 (1966), [1966-1967 Transfer Binder] CCH Fed. Sec. L. Rep. ¶77,343, *affirmed sub. nom. San Francisco Mining Exchange* v. *Securities and Exchange Commission*, 278 F. 2d 162 (C.A. 9).

—is "the fixing of reasonable rates of commission. . . ."[33]

The procedures prescribed in Section 19(b) that are to be followed in effecting changes in exchange rules relating to rates of commission, have been aptly summarized as follows:

> "The first step is that an exchange adopts rules fixing rates of commission. If changes are deemed necessary or appropriate, the Commission is to present an appropriate request in writing for specified changes. Compliance by the exchange presumably ends the matter, but if the exchange does not accede, the Commission is empowered, after appropriate notice and opportunity for hearing, 'by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) . . .'"[34]

In order to supplement its Section 19(b) authority to regulate the rules of registered securities exchanges

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[33] Congress' inclusion of rate-fixing in Section 19(b)(9) is consistent with another indicium of Congress' intent to fashion Commission regulation of exchanges around their essentially anticompetitive practices. Thus, Section 3(a)(3) of the Act defines an exchange member as

> "any person who is permitted either to effect transactions on the exchange without the services of another person acting as broker, or to make use of the facilities of an exchange for transactions thereon without payment of a commission or fee or with payment of a commission or fee which is less than that charged the general public. . . ."

[34] Securities and Exchange Commission, *Special Study of Securities Markets*, Pt. 2, p. 344 (1963), H. Doc. No. 95, 88th Cong., 1st Sess.

and because that authority would be fostered by affording "an opportunity for orderly Commission consideration of exchange rules before they become effective," the Commission in 1964 promulgated Rule 17a-8, 17 C.F.R. 240.17a-8, pursuant to Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a), which requires regulated entities to file reports. See Securities Exchange Act Release No. 7253 (1964). The Rule requires an exchange to file with the Commission "copies of . . . any proposed amendment or repeal of, or any addition to, its rules not less than three weeks . . . before any action is taken [by the exchange to adopt] . . . such amendment."

It can therefore be seen that the Exchange Act contemplates Commission supervision of exchange self-regulation through a process having both formal and informal aspects. Thus, the procedure set forth in Section 19(b), which authorizes the Commission to present a written request to an exchange to effect changes in its rules, as well as the procedure set forth in Rule 17a-8, affording the Commission an opportunity to examine proposed rule changes prior to their adoption, results in continuous Commission participation in the process of formulating exchange rules and amendments to exchange rules *without* the institution of a formal rulemaking or adjudicatory proceeding pursuant to Section 19(b).[35] In this process the Commission necessarily exercises its statutory mandate to insure that the exchange's rules are consistent with

[35] The Commission's authority is further supplemented by its power to conduct public investigatory hearings pursuant to Section 21(a), 15 U.S.C. 78u(a).

the purposes of the Act. This is precisely the way in which Congress desired the "partnership between government and private enterprise that marks the design of the . . . Exchange Act . . ." to operate. *Silver* v. *New York Stock Exchange, supra,* 373 U.S. at 366.

It is also evident that, commencing from the initial stage of registration of an exchange with the Commission, the necessity and propriety of exchange rules regarding the matters enumerated in Section 19(b), including the fixing of commission rates, are subject to the continuous jurisdiction of the Commission. And while

> "the promulgation of rules concerning exchange-required fixed commission rates is a matter that Congress entrusted to the exchanges in the first instance." [36]

any exchange's action affecting its commission rate structure is also a matter which must comport with Commission policy.

Under the public interest standard in Section 19(b), the Commission has for over three decades recognized that the national policy favoring competition is a highly relevant factor in determining whether rules of an exchange are "necessary or appropriate." [37] Furthermore, the standard governing the Commission's

[36] Securities Exchange Act Release No. 10560 (1973), CCH Fed. Sec. L. Rep. ¶79,603 at p. 83,620.

[37] See, *e.g., In the Matter of the Rules of the New York Stock Exchange,* 10 SEC 270, 287; Securities Exchange Act Release No. 8234 (January 26, 1968); Securities Exchange Act Release No. 9950 at pp. 169-70 (January 26, 1973) [185 BNA Sec. Reg. and

actions under Section 6(d) of the Act in ordering effective an exchange's registration involves the same public interest test found in Section 19(b) and therefore, contrary to the view of the Department of Justice (DOJ Br. 42), also requires Commission consideration of competitive factors.

Indeed, in the Commission's most recent public proceeding involving the registration of a national securities exchange—the Chicago Board Options Exchange [38] —under Section 6, the Antitrust Division of the Department of Justice was an active participant in the Commission's proceeding and urged that "it would be plainly contrary to the broad public interest in a competitive economy" for the Commission to permit the Chicago Board Options Exchange to have a fixed minimum commission rate system.[39] The Commission did in fact consider competitive factors in determining to order effective the Chicago Board Options Exchange's rules.[40]

L. Rep. (January 17, 1973)]. In *Silver* v. *New York Stock Exchange, supra,* 373 U.S. at 364, n.16, this Court stated that an exchange rule adopted at the direction of the Commission pursuant to Section 19(b) would have to be "consonant with the antitrust laws." See also *Bowman* v. *Arkansas-Best Freight System, Inc.*, 95 S. Ct. 438, 448; *Gulf States Utilities* v. *Federal Power Commission,* 411 U.S. 747; *Federal Maritime Commission* v. *Seatrain Lines, Inc., supra,* 411 U.S. 726.

[38] See *Chicago Board Options Exchange, Inc.,* Securities Exchange Act Release No. 9985 (February 1, 1973), CCH Fed. Sec. L. Rep. ¶79,212 at p. 82,669.

[39] See Comments of the United States Department of Justice, Proposed Rules of the Chicago Board Options Exchange, Securities and Exchange Commission File No. 10-54-1 (January 15, 1973), p. 4. (Doc. App. 162, 165).

[40] See *Chicago Board Options Exchange, Inc.,* Securities Exchange Act Release No. 9985, *supra,* CCH Fed. Sec. L. Rep. ¶79,212 at p. 82,671.

However, competition is not the sole factor the Commission must consider in regulating exchange rules. The scheme of regulation in the Exchange Act is the "frame of reference within which the Commission operates; and the policy expressed in [that Act] must be the basic determinant of its action." [41] Accordingly, along with the national policy favoring competition, the Commission must also be concerned with such questions as the liquidity of the exchange markets, the ability of the brokerage industry to raise capital for industry and to provide efficient and effective service to investors.[42]

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[41] *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 79-80, 85-88 (Interstate Commerce Commission); *Bowman* v. *Arkansas Best Freight System, Inc., supra,* 95 S. Ct. at 448; *cf., California Gas Producers Association* v. *Federal Power Commission,* 421 F. 2d 422, 428-29 (C.A. 9), *certiorari denied,* 400 U.S. 819; *City of Statesville* v. *Atomic Energy Commission,* 441 F. 2d 962, 987 (C.A. D.C.) (Leventhal J., concurring); *Northern Natural Gas Co.* v. *Federal Power Commission,* 399 F. 2d 953, 961 (C.A. D.C.). The legislative history of the Exchange Act suggests that Congress intended that the Commission, in exercising its Section 19(b) authority over exchanges, look to the policies of the Act generally for a standard. See 78 Cong. Rec. 8091 (remarks of Mr. Lea).

[42] Recognition of the need to balance these competing policy considerations has motivated the congressional committees' studying the securities industry's rate structure to endorse the Commission's program for a phased elimination of fixed rates. See *Regulation of Securities Trading by Members of National Securities Exchanges and the Sale of Investment Advisers of Registered Investment Companies, A Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 470,* Sen. Doc. No. 93-187, 93d Cong., 1st Sess., at 3 (1973); *Report of the Subcommittee on Securities, Senate Committee on Banking, Housing and Urban Affairs, Securities Industry Study,* 93d Cong. 1st Sess. (February 1, 1973) at 62. See also Hearings before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs on S. 3169, 92d Cong., 2d Sess., pp. 8, 11, 14 (Testimony of William J. Casey, Chairman, Securities and Exchange Commission).

Thus, to the extent that changes in an exchange's rules, including modification of the commission rate structure of an exchange, may affect the ability of the exchange to operate, the Commission must weigh the continued viability of the exchanges against a policy considering competition alone. Commission consideration of these factors has been most recently illustrated in the Commission's adoption of Rule 19b-3, 17 CFR 19b-3, which prohibits the fixing of commission rates by exchanges after certain dates."

The Commission's continuing jurisdiction to supervise exchange rules and practices with respect to the matters enumerated in Section 19(b) and the fact that the Commission weighs the national policy favoring competition in its administration of its mandate to supervise exchange rules and practice demonstrates that Congress intended the Commission's jurisdiction over the matters enumerated in Section 19(b) to perform the "antitrust function." "

Moreover, as the court of appeals recognized (451a; 448 F. 2d at 1311), implied repeal of the antitrust laws does not preclude a sufficiently-aggrieved person from challenging exchange rules which may be anti-competitive."

" See Securities Exchange Act Release No. 11203 (January 23, 1975); see also pp. 75-80, *infra*.

" *Silver* v. *New York Stock Exchange, supra*, 373 U.S. at 358; see also *Kaplan* v. *Lehman Brothers*, 389 U.S. 954, 956 (Warren, C. J., dissenting from denial of certiorari); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 302, n.13.

" Appropriate judicial review is not by way of collateral attack on exchange rules maintained under Commission supervision, but rather through direct judicial review of Commission action with respect to the exercise of its supervisory responsibility. The judicial check on Commission action is afforded by the fact that Commission orders promulgated under Sections 6 and 19(b) are reviewable in a court of appeals pursuant to Section 25(a) of the Act, 15 U.S.C. 78j(a). And, Commission rules adopted under Section 19(b), as well as informal exercises of the Commission's supervisory authority, such as a determination not to object to the adoption of a proposed rule, have been held to involve "agency action" which, under appropriate circumstances, is reviewable in a district court. *See Independent Broker-Dealers' Trade Association* v. *Securities and Exchange Commission* 442 F.2d 132, 141-143, *certiorari denied*, 404 U.S. 482; *cf.*, *PBW Stock Exchange, Inc.* v. *Securities and Exchange Commission*, 485 F.2d 718, 726, 733 (C.A. 3), *certiorari denied*, 416 U.S. 964. *See generally* Sections 4(d), 10(a) and 10(d) of the Administrative Procedure Act, 5 U.S.C. 553(e), 702(a), (d). Thus, it cannot be said that implied repeal of the antitrust laws in this area would leave the Commission with unreviewable authority over exchange rules.

" *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware, supra*, 414 U.S. at 125.

II. Application of the Antitrust Laws to Exchange Conduct Subject To Commission Jurisdiction Would Be Repugnant to the Scheme of Regulation Established By the Exchange Act.

A. Silver and Ware Require a Determination in the First Instance of Whether the Exchange Act's Regulatory Scheme Will Work if Antitrust Laws Are Applied To Exchange Activity Subject To Commission Jurisdiction Under Section 19(b).

With the framework and goals of the Exchange Act presented, it is now appropriate to consider "the principles of stock exchange pre-emption delineated" " by this Court in *Silver* v. *New York Stock Exchange, Inc., supra,* 373 U.S. 341, and *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware, supra,* 414 U.S. 117.

In *Silver,* the petitioners, who were not members of the NYSE, brought an action under the Sherman Act alleging that the NYSE "conspired with its member firms to deprive petitioners of their private wire connections and stock ticker service" provided to them by members of the NYSE. 373 U.S. at 345. This Court initially noted that since the NYSE's action, in causing member firms to disconnect petitioners' wire connections and stock ticker, constituted a group boycott, "absent any justification derived from the policy of another statute or otherwise, the Exchange acted in violation of the Sherman Act." *Id.* at 347-349. Because the NYSE had taken action under color of enforcing "its rules governing members' transactions and relationships with non-members," purportedly "germane to performance of . . . [its] duty" of self-regulation embodied in the Exchange Act (*id.* at 356), the existence of a *prima facie* violation of the antitrust laws was found by the Court to be only "the beginning, not the end, of inquiry." *Id.* at 349. As this Court stated, the "antitrust aim of eliminating restraints on competition" must be reconciled "with the effective operation of a public policy [embodied in the Exchange Act] contemplating that securities exchanges will engage in self-regulation which may well have anti-competitive effects in general and in specific applications." *Id.*

In effecting this reconciliation between the public policy of the Exchange Act and the aims of the antitrust laws, this Court enunciated the "guiding principle" that, since the Exchange Act "contains no express exemption of the antitrust laws," and since

"'[i]t is a cardinal principle of construction that repeals by implication are not favored,'" an implied repeal would be found "only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Id.* at 357. This Court then distinguished between two aspects of the self-regulatory scheme embodied in the Exchange Act: those self-regulatory activities of registered exchanges over which the Commission has jurisdiction; and those self-regulatory activities which are not within the Commission's jurisdiction. *Id.* In this regard, the Court observed that while the Commission has the "power to request exchanges to make changes in their rules" and "to disapprove any rules adopted by an exchange," it does not have "jurisdiction to review particular instances of enforcement of exchange rules." 373 U.S. at 357. Accordingly, the particular exchange action before this Court in *Silver* was believed by the Court not to be subject to the Commission's jurisdiction and therefore the question of reconciliation in that case did "not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory power." *Id.* at 358.

This Court further observed that the Exchange Act contains no "form of review of exchange self-policing" as to its rules and therefore "[t]here is nothing built into the regulatory scheme which performs the *antitrust function* of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." *Id.* at 358-359 (emphasis added). Furthermore, this Court ruled that ap-

plication of the antitrust laws to *particular instances of exchange enforcement* of exchange rules was "not at all incompatible with the fulfillment of the aims of the Securities Exchange Act," since "under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate" of the Act. *Id.* at 359-360. This Court stated:

> "Applicability of the antitrust laws, therefore, [rested in *Silver*] on the need for vindication of their positive aim of insuring competitive freedom. Denial of their applicability [to the *Silver* facts] would defeat the congressional policy reflected in the antitrust laws *without serving the policy of the Securities Exchange Act. Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented.*"

Id. at 360 (emphasis added).[47]

In *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware, supra,* 414 U.S. 117 this Court recently reaffirmed and elaborated upon the principles of stock exchange pre-emption expressed in *Silver*. In *Ware,* this

[47] Finally, this Court concluded that the manner in which the NYSE and its members acted to disconnect the wire connections and stock ticker service to petitioners deprived the petitioners of such basic procedural safeguards that "the Exchange [had] . . . not even reached the threshold of justification under [the Exchange Act] . . . for what would otherwise be an antitrust violation." The Court therefore sustained the petitioners' antitrust challenge. 373 U.S. at 361-365.

Court considered whether a NYSE rule requiring arbitration of controversies arising out of the termination by an individual of his employment with an exchange member pre-empted California state law which afforded an employee the right to litigate wage disputes arising out of his employment. In its analysis, this Court stressed that the Exchange Act established a scheme of supervised self-regulation in which the Commission is provided with "direct supervisory" authority over exchange regulation and exchange rules relating to "12 designated subject areas and 'similar matters'" enumerated in Section 19(b). *Id.* at 129-30.[48] These matters, this Court reasoned, are germane to "the congressional aim in supervised self-regulation . . . to insure fair dealing and [the] . . . protection of investors from harmful or unfair trading practices" (*id.* at 130), and "[a]s a consequence, some exchange rules [*i.e.,* those not within the scope of Section 19(b)] are not subject to direct Commission scrutiny." *Id.* at 129.[49] Such an exchange rule which is not "directly

[48] In addition to its Section 19(b) authority, it was also noted in *Ware* that the Commission is given rulemaking authority in a number of other sections of the Act to promulgate rules which will affect the conduct of exchange members. 414 U.S. at 129, n. 10. See Sections 8, 9, 10, 11, 14 and 17 of the Exchange Act, 15 U.S.C. 78h, 78i, 78j, 78k, 78n and 78q.

[49] Indeed, the Commission urged this position in *Ware* in its brief *amicus curiae* to this Court where it stated at pages 11-12:

> "Exchange rules that are not substantially related to the statutory objectives should not be considered paramount to otherwise conflicting statutes. Compare *Silver* v. *New York Stock Exchange,* 373 U.S. 341. Rule 347(b), as applied here, cannot be said to be related to the regulatory objectives of the statute in any but the most indirect manner, and therefore it is not the type of exchange self-regulation within the scope and purposes

related to the Act's purposes" because it is not "designed to insure fair dealing and to protect investors," this Court stated, "would not appear to fall under the shadow of the federal umbrella [of stock exchange pre-emption]; it is instead, subject to applicable state law." *Id.* at 131.[50]

Unlike the instant case, where the challenged conduct—the fixing of minimum rates of commission—is directly within the scope of the Commission's regulatory authority under Section 19(b), the self-regulatory conduct at issue in both *Silver* and *Ware* was considered as not subject to the supervisory jurisdiction of the Commission. This Court explained in *Silver,* however, that the antitrust laws are repealed to the extent necessary to make the Exchange Act work and stated that "[s]hould review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." 373 U.S. at 360.[51]

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of the Securities Exchange Act that might oust conflicting provisions of state law. If the exchange rule in issue before this Court did involve a matter sufficiently important to the Act's objectives to be within the ambit of the Commission's pervasive regulatory oversight as delineated by the Act, state law in conflict with the rule would be preempted" (footnote omitted.).

[50] Since none of the subject matter categories of Section 19(b) was found to suggest "that the Commission has review authority with respect to a rule requiring arbitration of employer-employee disputes" (414 U.S. at 135, n. 14), and since the relationship between compulsory employer-employee arbitration and the matters enumerated in Section 19(b) was determined to be "'extremely attenuated and peripheral, if it exists at all,'" this Court held that the exchange's arbitration rule did "not require pre-emption of contrary state law." *Id.* at 135-137.

[51] This Court's application of the antitrust laws in *Silver,* in spite of its observation that the Commission may have had au-

Furthermore, in limiting its inquiry in *Silver* to the question of whether the NYSE's action could in fact be justified as effectuating a self-regulatory goal under the Exchange Act, because *Silver* did "not involve any problem of conflict or coextensiveness of coverage with the [Commission's] . . . regulatory power" (373 U.S. at 358), this Court contrasted the inquiry it was making with the inquiry it had made in other antitrust exemption cases in which the antitrust laws potentially conflicted with an agency's regulatory powers. *Georgia* v. *Pennsylvania R.R. Co., supra,* 324 U.S. 439; *United States* v. *Radio Corporation of America,* 358 U.S. 334; *California* v. *Federal Power Commission, supra,* 369 U.S. 482; *Pan American World Airways, Inc.* v. *United States, supra,* 371 U.S. 296. In those cases this Court did not resolve the question of implied repeal of the antitrust laws on the basis of whether the challenged conduct of the regulated entity, which was subject to the agency's jurisdiction, was, as a matter of fact, necessary to make the regulatory act work. Rather this Court examined whether or not, as a matter of law, it would be repugnant to the operation of the regulatory scheme intended by Congress to apply the antitrust laws to matters arguably subject to the agency's jurisdiction.[52]

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thority to order the NYSE to adopt a rule "providing a hearing and attendant procedures to non-members," 373 U.S. 364 n.16, does not establish, as the Department of Justice argues (DOJ Br. 19-20), that the antitrust laws are to be applied to existing exchange rules subject to the Commission's jurisdiction. For, as explained above, *Silver* involved a particular instance of exchange conduct which was not pursuant to any existing exchange rule; it did not involve the validity of an exchange rule.

[52] *Accord, Otter Tail Power Co.* v. *United States, supra,* 410

B. The Exchange Act's Regulatory Scheme Will Not Work As Congress Intended if the Antitrust Laws are Applied to Exchange Activity Respecting Matters Subject to the Commission's Jurisdiction Under Section 19(b).

It is the Commission's position that reconciliation of the antitrust laws with the regulatory scheme established in the Exchange Act requires that where exchange rules are clearly subject to the Commission's jurisdiction the antitrust laws must be found to be inapplicable. The Commission's view is that in order to make its regulatory jurisdiction over exchange rules work in the manner intended by Congress, it is necessary to pre-empt the antitrust laws.[33]

The regulatory scheme established in the Exchange Act was designed to provide regulation in an area where "the complicated nature of the problems justified leaving much greater latitude of discretion with the administrative agencies than would otherwise be the case"; "a field where practices constantly vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means." H.R. Rep. No. 1383, *supra*, pp. 6-7. Congress thus felt justified in vesting in the Commission, "within constitutional limitations, that measure of flexibility required

U.S. 366; *Hughes Tool Co.* v. *Trans World Airlines, Inc., supra,* 409 U.S. 363; *Carnation Co.* v. *Pacific Westbound Conference, supra,* 383 U.S. 213; *United States* v. *Philadelphia National Bank, supra,* 374 U.S. 321.

[33] See *Kaplan* v. *Lehman Brothers,* 250 F. Supp. 562 (N.D. Ill., 1966), *affirmed,* 371 F. 2d 409 (C.A. 7), *certiorari denied,* 389 U.S. 954. *J. R. Williston & Beane, Inc.* v. *Haack, supra,* [Current Binder] CCH Fed. Sec. L. Rep. ¶94,921.

in dealing with so intricate a subject matter" (*id.*), and accordingly granted to the Commission "broad discretionary powers" (*id.*)—powers to investigate the operation of the exchange market, to review existing exchange rules and to initiate prospective rules of general or particular application. This authority to formulate policy for the securities industry, and thereby in effect to legislate, cannot be exercised

> "in a cursory or incomplete manner or without having extensive hearings and examinations into the subject matter, and without permitting those interested, representing the public and groups in the securities industry an opportunity for a full expression of views."

Stark v. *New York Stock Exchange, Inc., supra,* 346 F. Supp. at 227.

Yet, if as the Department of Justice argues, district courts possessed jurisdiction under the antitrust laws over exchange operations concurrent with that of the Commission, the whole regulatory structure of the securities exchanges would be impaired. Enforcement of the antitrust laws involves no question of regulatory policy but merely application of existing standards to adduced facts.[34] A district court "acting on a single, isolated case-and-controversy record in a private suit"

[34] "[T]he judicial function is traditionally to weigh the merits of a particular controversy, but not to engage in a consistent determination of policy or to maintain steady contact with a general and continuing problem." Walter Gellhorn, "The Administrative Agency—A Threat to Democracy?" at 517 in *Separation of Powers and the Independent Agencies: Cases and Selected Readings,* prepared for the Subcommittee on the Judiciary of the Senate Committee on the Judiciary, 91st Cong., S. Doc. No. 91-49.

is simply not equipped to consider the broad economic policies involved—the interrelationship of a particular rule to the structure of the regulated industry, and the implications of abandoning that rule. *Cf., Port of Boston Marine Terminal Ass'n* v. *Rederiaktiabolaget Transatlantic,* 400 U.S. 62, 69.

Moreover, were a district court to apply the necessary-to-make-the-Act work standard to exchange rules subject to Commission jurisdiction—in the manner intended by *Silver* to operate with respect to exchange conduct *outside* the scope of Commission authority—the very purposes of Congress in vesting the Commission with supervisory authority would be frustrated. What is necessary to make the Act work today may be unnecessary or even counter-productive tomorrow. A period of experimentation may be required in order to resolve whether an exchange's rules are appropriate for present purposes,[55] even though there may be no present answer to the question of appropriateness in the long run.

This inability of the district courts to perform the regulatory function which Congress intended to impose over exchange operations, requires the conclusion that application of the antitrust laws to exchange rules *specifically subject to the Commission's jurisdiction* would be repugnant to the Exchange Act. To make the Securities Exchange Act work, it is necessary, at the minimum, that the Commission be able to perform the policy-making functions expressly assigned to it by that Act, in the application of standards set forth in

[55] *Cf. Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 455 F. 2d 1340, 1345 (C.A. D.C.).

that Act, through the procedures prescribed by that Act. The Exchange Act cannot be expected to work as Congress intended if district courts may render *ad hoc* decisions applying antitrust standards to matters involving the very structure of the securities industry and thereby pre-empt the Commission's policy-making functions. Antitrust jurisdiction would both (1) result in the fashioning of national policy respecting securities exchanges in part by entities which are not equipped to perform that function as Congress intended it to be performed and (2) inevitably lead to conflicts and inconsistencies in judgment between the Commission's determinations and the holdings of numerous antitrust courts. Because of this "plain repugnancy between the antitrust and regulatory provisions" (*United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 350-351), the antitrust laws must be held to have been impliedly repealed with respect to matters within the Commission's jurisdiction under the Act, and in particular with respect to the commission rate structure.

Similarly, as this Court observed in *Silver, supra,* 373 U.S. at 352, Congress intended through the Exchange Act to leave with the exchanges "the initiative and responsibility for promulgating regulations pertaining to the administration of their . . . affairs" subject to Commission jurisdiction. See S. Rep. No. 792, *supra,* at p. 13. Notwithstanding this congressional intent, this Court felt, in *Silver*, that application of the antitrust laws to exchange conduct not within the scope of Commission supervisory jurisdiction would not inhibit effective self-regulation because "under the aegis of the rule of reason, traditional antitrust con-

cepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act." 373 U.S. at 360. Application of the antitrust laws to conduct clearly within the Commission's supervisory jurisdiction, however, would inhibit the scheme of supervised self-regulation.

Any meaningful exercise of self-regulation will, as this Court recognized in *Silver,* 373 U.S. at 360, likely have some anti-competitive implications.[56] Thus, if, as asserted by the Department of Justice (DOJ Br. 48), the only antitrust umbrella afforded by Commission jurisdiction occurs when the Commission affirmatively promulgates a rule or order pursuant to Section 19(b)[57] then the exchange could be expected, contrary to congressional intent, to abdicate all but the most innocuous of their self-regulatory responsibilities and leave all initiative to the Commission in order to avoid the risk of substantial antitrust liability for engaging in self-regulation outside the umbrella of a Commission directive. Moreover, this risk of antitrust liability would almost certainly result in the exchange's resistance to informal Commission requests and directions which, in the Department of Justice's view, would not provide any umbrella against antitrust attack for anti-

[56] See also *J. R. Williston & Beane* v. *Haack, supra,* CCH Fed. Sec. L. Rep. ¶94,921.

[57] Indeed, the Department of Justice does not, apparently, even regard a formal Commission order registering an exchange and approving its rules pursuant to Section 6, as providing immunity from antitrust attack. See *United States* v. *Chicago Board Options Exchange,* No. 73 C 1085 (N.D. Ill., complaint filed April 26, 1973); DOJ Br. 42.

competitive action. In consequence, the congressional scheme which specifically contemplated that self-regulatory judgments would be made by the exchanges in the first instance would be abrogated and the cooperative partnership between public and private regulation established in the Act would be seriously eroded.

C. Antitrust Exemption for Exchange Conduct Subject to the Commission's Jurisdiction Is Compelled by This Court's Pronouncements Concerning Implied Repeal of the Antitrust Laws with Respect to Other Regulatory Schemes

1. Ricci v. Chicago Mercantile Exchange is consistent with recognizing an antitrust exemption for exchange rules subject to Commission jurisdiction

The Department of Justice recognizes that this Court in *Silver* did not reach the question of antitrust immunity with respect to exchange rules and practices subject to the Commission's jurisdiction, but rather noted that this question would present "a different case." 373 U.S. 360. The Department of Justice, however, says that *Ricci* v. *Chicago Merchantile Exchange,* 409 U.S. 289, is that "different case"[58] and relies heavily upon that decision. This reliance is misplaced. As the Chief Justice pointed out in his concurring opinion in *Ricci,* this Court in that case did not resolve the issue left open in *Silver.* As he said: "Indeed, the *Silver* problem is not before us." 409 U.S. at 308.

Ricci, like *Silver,* involved a private dispute between the petitioner Ricci and an exchange, in that case the

[58] DOJ Br. 20.

Chicago Merchantile Exchange. Ricci, contending that the exchange had improperly terminated his membership in violation of the rules of the exchange, the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, and the anti-trust laws, filed an action in the district court. The district court dismissed the complaint, and on appeal the court of appeals directed the district court to stay further proceedings to permit administrative action by the Commodity Exchange Commission. This Court affirmed. In so doing, this Court, like the court of appeals, did not reach the question of antitrust immunity. All that was involved was an issue of primary jurisdiction over the particular dispute. This Court, 409 U.S. at 304, said the issue in *Ricci* "seems to depend in the first instance on whether the transfer of Ricci's membership was in violation of the Act for failure to follow exchange rules. That issue in turn appears to pose issues of fact . . ." [59] Insofar as *Ricci* is relevant at all to this case, it tends to support not reject antitrust immunity in the case at bar.

Essentially, this Court in *Ricci* affirmed reference to the Commodity Exchange Commission because it believed that factual findings of the administrative agency would "be of material aid in resolving the im-

[59] This Court, 409 U.S. at 305 n. 15 elaborated on these factual issues as follows:

"Likely issues for the fact-finder are whether Ricci revoked the transfer authorization before or after he was informed that his membership was transferred; whether the transfer authorization was valid; whether Siegel had a lien against Ricci's membership because of its loan to Ricci for the purchase of a membership; whether Siegel owed brokerage fees to Ricci; and if so, whether these brokerage fees could be offset against the debt for the membership purchase."

munity question." 409 U.S. at 302. This was true because, if the agency determined that the action of the exchange in terminating Ricci's membership was a violation of the rules of the exchange and therefore of the Commodity Exchange Act [60] then "the immunity issue will dissolve." 409 U.S. at 306. If, on the other hand, the agency were to find that the action of the exchange was in conformity with its rules, there would then be presented a question as to antitrust immunity which was "plainly substantial" 409 U.S. at 303,, and the administrative decision would assist the court in arriving "at the essential accommodation between the antitrust and the regulatory regimes." 409 U.S. at 307.

This Court concluded in *Ricci* that the question of whether the Chicago Merchantile Exchange could terminate Ricci's membership as a result of a dispute concerning indebtedness, without incurring antitrust liability, presented a "substantial" question as to immunity. In the light of this conclusion, the present case involving, as it does, the viability of the Securities and Exchange Commission's authority to regulate the structure and operations of the securities exchanges pursuant to express statutory mandate, would seem to present a clear case for such immunity.

[60] The Commodity Exchange Act, 7 U.S.C. 1, *et seq.*, requires a "contract market," such as the Merchantile Exchange, to have rules, which must be filed with the Secretary of Agriculture, and imposes a statutory duty upon such an exchange to enforce its own rules. That Act also empowers the Commodity Exchange Commission to conduct administrative proceedings for the purpose of determining whether or not a commodity exchange is enforcing its rules and to impose sanctions if such a failure of enforcement is found. It was for this type of determination that this Court referred Ricci's dispute to the agency.

The Department of Justice relies on *Ricci* for two principal propositions. First, that the antitrust courts rather than the administrative agency have authority to decide whether antitrust immunity exists (DOJ Br. 17)[61] and secondly, that the issue of antitrust immunity can be resolved only upon a "full record" because what is involved is "an aspect of the rule of reason."[62] (DOJ Br. 17, 24).

As to the first point, we do not contend that this Commission has exclusive authority to determine whether there is antitrust immunity, but, on the contrary, we recognize that this question is properly before this Court. Our position, of course, is that this Court should decide—as have the courts below—that on the circumstances relevant to this case immunity does exist.

As to the second point, this Court did conclude in *Ricci* that an administrative record as to the facts involved in Ricci's dispute with the exchange would be

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[61] The Department of Justice relies particularly upon a footnote in the *Ricci* opinion in which this Court referred to the fact that there was no express grant of antitrust immunity in the Commodity Exchange Act and concludes that Congress did not intend the *adjudicative* authority given the Commodity Exchange Commission to be a complete substitute for judicial enforcement of the antitrust laws. (DOJ Br. 22) That proposition does not support the contention that the Commission's *regulatory* jurisdiction over stock exchanges is to be superseded by the antitrust laws.

[62] The suggestion of the Department that under *Silver* the issue now before this Court is "an aspect of the rule of reason" misreads the *Silver* decision (DOJ Br. 24). This Court indicated in *Silver* that, while no antitrust immunity existed in the *absence* of Commission power to review a particular exchange exercise of self-regulation, even in that situation, and only after that finding, the rule of reason could be applied to permit the exchange "sufficient breathing space within which to carry out the mandate of the Securities Exchange Act." 373 U.S. 360.

helpful to the antitrust court, although it did not suggest that such a record was essential. In the case at bar, however, we believe that both of the courts below by summary judgment properly disposed of the issue as to whether the Commission's express statutory authority to regulate and supervise the stock exchanges should be superseded and disrupted by antitrust challenge. There is not any real dispute as to the facts. The exchanges do fix commission rates and have done so for over 180 years, and there is no doubt as to the Commission's authority over that practice. The question before this Court is not, as the Department of Justice seems to suggest, whether the rates prevailing at any particular time were reasonable or even whether it was necessary to have fixed rates at all under the conditions prevailing at the time this plaintiff commenced his action. Rather, the issue is whether the Commission's jurisdiction over the subject of commission rates should be preserved as a part of the comprehensive scheme for Commission regulation of the securities markets.

This point is vividly illustrated by the concession of the Department of Justice that "If the SEC were to order the exchanges to adhere to a fixed commission rate system of some kind, no antitrust liability could arise." (DOJ Br. 48). A fixed rate system existed when the Exchange Act was adopted, and Congress, as well as the Commission, recognized its existence. No Commission order was required to create such a system, but the continuance of a fixed rate system *was* predicated upon a formal order of the Commission issued in 1934 registering the defendant exchanges as national securities exchanges under Section 6 of the Exchange Act. As

we have observed earlier, any exchange seeking to be registered as a national securities exchange in 1934 was required to file with the Commission copies of its articles of incorporation, bylaws and all rules and regulations—which included its rules requiring its members to charge fixed commission rates on all transactions effected on the exchange. The Commission, then, in 1934, after finding that the rules and regulations of the defendant exchanges (including rules relating to a fixed commission rate system) were "just and adequate to insure fair dealing and to protect investors" exercised its jurisdiction under Section 6(d) of the Exchange Act to register the exchanges by the issuance of a formal "order."[63]

As we observe at some length in Part II D *infra*, the Commission has exercised its jurisdiction over the fixed rate system ever since. The Commission has conducted studies and held hearings over the years to study the fixed rate system as conditions changed in the securities markets. The Commission initially responded to changing conditions in the securities markets by taking various steps—including the informal procedures included in its package of regulatory tools under the Exchange Act—designed to modify the commission rate structure without, at the same time, unnecessarily disrupting exchange operations or impairing investor protection. Ultimately concluding that a fixed commission rate system was no longer necessary or appropriate, the Commission in 1975, by rule directed the exchanges to

[63] See Order of Commission issued to NYSE, (September 28, 1934) (A-238). In its order the Commission also specifically made reference to its power "under Section 19 and other sections of said Act" to alter or supplement rules of the exchange (A-239).

terminate that system, thus in effect ordering them *not* to adhere to such a system, a result which the Department of Justice now applauds. Securities Exchange Act Release No. 11203 (January 23, 1975) (Doc. App. 109).

Thus, it is clear that the fixed commission rate system of the defendant exchanges was initially approved by the Commission by formal "order" in 1934, has been consistently approved, modified and altered by the Commission through its less formal regulatory tools during the intervening 41 years, and has culminated in 1975 through the issuance of another formal "order" by the Commission. In view of this history of the Commission's exercise of its statutory jurisdiction over the practice of fixed commission rates, it is particularly difficult to comprehend how the Department of Justice can now urge application of the antitrust laws to this practice and at the same time concede that "no antitrust liability could arise" if the SEC "were to order the exchanges to adhere to a fixed commission rate system." DOJ Br 48.

The foregoing demonstrates the Department of Justice's misplaced reliance on *Ricci*. In this case there exists specific statutory jurisdiction by an administrative agency over an important aspect of a regulatory scheme, which is to be, and has been, exercised through formal orders and other regulatory means specifically contemplated by the Act. There simply are no facts needing resolution by a trier of fact. What we have here is a question of law—whether there is a plain repugnancy between the antitrust laws and the regulatory scheme embodied in the Exchange Act—precisely the

issue of implied repealer this Court said in *Ricci* would be reached *after* the factual issues were resolved."

2. Each of the elements which this Court has considered necessary in order to find an implied repeal of the antitrust laws is present here.

The Commission's position, that exchange rules specifically subject to its jurisdiction are immune from antitrust attack, is in harmony with this Court's past precedents. An examination of this Court's decisions regarding implied repeal of the antitrust laws with respect to other regulatory schemes makes plain that repugnancy between the antitrust laws and the regulatory scheme turns upon the existence of two elements attendant to the regulatory scheme; both of these elements are present in the Exchange Act.

First, this Court has required that the conduct challenged under the antitrust laws be subject to the juris-

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[64] Both the majority and dissent suggested in *Ricci* that the jurisdiction of the agencies established under the Commodities Exchange Act was so limited that that regulatory scheme could not be viewed as a substitute for the application of the antitrust laws. 409 U.S. at 302, n. 13, 312-313. As we have shown above, the jurisdiction of the Commission established under the Securities Exchange Act to supervise the rules of securities exchanges is plenary and therefore markedly different from the regulatory scheme respecting commodities exchanges existing at the time of the *Ricci* dispute. Indeed, because it viewed the regulatory scheme over commodities exchanges, which operated at the time of the *Ricci* dispute, as inadequate, Congress has recently created "an agency comparable in stature and responsibility to the Securities and Exchange Commission" to regulate more completely commodities exchanges. Senate Committee on Agriculture and Forestry, *The Commodities Futures Trading Commission Act of 1974*, 93d Cong., 2d Sess., p. 2 (Committee Print); *see also* 120 Cong. Rec. 2924, 2928.

diction of the regulatory agency to supervise and review. Thus, in *Pan American World Airways, Inc.* v. *United States, supra,* 371 U.S. at 305, in finding an implied repeal, this Court specifically noted that the "acts charged . . . are precise ingredients" of the administrative agency's authority. On the other hand, where this Court has found that the regulated entity's anti-competitive conduct is outside the scope of agency supervisory jurisdiction vested by a regulatory statute, it has refused to recognize an implied repeal of the antitrust laws. See *Georgia* v. *Pennsylvania R.R. Co., supra,* 324 U.S. at 456-457; *Silver* v. *New York Stock Exchange, supra,* 373 U.S. 341; see also *Federal Maritime Commission* v. *Seatrain Lines, Inc., supra,* 411 U.S. 726 (where a one-time rate fixing agreement was found to be outside the scope of the Federal Maritime Commission's express authority to grant antitrust immunity to ongoing rate fixing agreements between shippers, and hence subject to antitrust attack); *compare Hughes Tool Co.* v. *Transworld Airlines, Inc., supra,* 409 U.S. 363 (finding an exemption from the antitrust laws with respect to conduct subject to the jurisdiction of the Civil Aeronautics Board) *with id.* at 389 (dissenting opinion urging that the challenged conduct in that case was outside of the CAB's "substantive mandate" to review). As the preceding analysis of the structure and policy of the Exchange Act makes clear, the Commission was expressly granted continuing supervisory jurisdiction over any important matters relating to stock exchanges including, specifically, the fixing of commission rates.

Second, this Court has refused to find an implied

repeal of the antitrust laws, even where a regulatory agency has jurisdiction to supervise the challenged conduct and even when in the course of exercising that jurisdiction the agency is required to consider competitive factors, if in the context of the regulatory scheme the agency's jurisdiction is not intended to be a substitute for the antitrust function. See *California* v. *Federal Power Commission, supra,* 369 U.S. 482; *United States* v. *Philadelphia National Bank, supra,* 374 U.S. 321; *Otter Tail Power Co.* v. *United States, supra,* 410 U.S. 366. But where it has found that the question of whether the challenged conduct "meet[s] the standards of competition and monopoly provided by the [regulatory] Act is peculiarly a question for the administrative agency," then in order to avoid the collision of two regimes which might result "[i]f the courts were to intrude independently with their construction of the antitrust laws," this Court has recognized an implied repeal. *Pan American World Airways* v. *United States, supra,* 371 U.S. at 309-310. Recognition of an implied repeal in such circumstances is consistent with this Court's repeated concern to avoid "sporadic action by federal courts [which] would disrupt an agency's delicate regulatory scheme. . . ." *United States* v. *Radio Corporation of America, supra,* 358 U.S. at 348; see also *Carnation Co.* v. *Pacific Westbound Conference, supra,* 383 U.S. at 220-221. While the Commission must, and does, consider competitive factors in supervising exchange rules, it must balance those factors against other policies of the Exchange Act in order to formulate a complete regulatory policy which it finds to be "necessary or appropriate."

Moreover, as we have demonstrated, the Commission's exercise of its regulatory mandate will not work if the courts independently subject matters within the Commission's Section 19(b) jurisdiction to "their construction of the antitrust laws." *Pan American World Airways* v. *United States, supra,* 371 U.S. at 310.

D. The Public Record of Commission Supervision Over the Exchanges' Commission Rate Structure Illustrates the Necessity of Leaving Such Matters Solely to the Jurisdiction of the Commission.

Since application of the antitrust laws to exchange rules concerning the fixing of minimum commission rates as well as to all other exchange practices that are within the scope of the Commission's supervisory jurisdiction would be inimical to and would frustrate the regulatory scheme of the Exchange Act, such rules and practices must be considered to be immune from antitrust attack even where they have not been specifically mandated by a formal rule or order of the Commission under Section 19(b). The necessity for pre-emption of the antitrust laws is fully supported by the public record of the Commission's active exercise of its jurisdiction over the commission rate structure of the exchanges. This record illustrates the effectiveness of the formal and informal processes contemplated by the Act for dealing with the complex and subtle issues posed in formulating policy with respect to exchange rules. It also substantiates the necessity for leaving exchange self-regulatory conduct, with respect to matters which Congress brought within the scope of the Commission's authority, to the exclusive jurisdiction of the Commission.

The respective fixed commission rate structures of the NYSE and the AMEX were approved by the Commission in 1934 when the Commission granted the applications of those exchanges for registration as "national securities exchanges" pursuant to Section 6 of the Exchange Act (43a-44a, 217a, 229a-239a). Thereafter, the defendant exchanges amended their rules respecting commission rates from time to time, submitting copies of these amendments upon their adoption to the Commission for its review in accordance with Section 6(a) of the Act (44a, 218a).

Pursuant to a congressional mandate in 1961, 15 U.S.C. 78s(d), the Commission published in 1963 a six-volume Special Study of Securities Markets, H.R. Doc. 95, 88th Cong., 1st Sess. (hereinafter cited as "Special Study"), which contained the results of a detailed investigation by the Commission's staff of the operation of the securities industry. Commencing in 1964, the Commission's staff and the exchanges initiated discussions to implement the recommendations of the Special Study (44a, 219a-220a). Then, in 1968, in order to examine fully certain practices pertaining to fixed stock-exchange-commission rates, the Commission held investigatory hearings, pursuant to Section 21(a) of the Exchange Act, 15 U.S.C. 78u(a),[65] on the commission rate structure of securities exchanges and the

[65] Section 21(a) of the Exchange Act authorizes the Commission "in its discretion, . . . to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid . . . in the prescribing of rules and regulations. . . [under the Exchange Act], or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates."

securities industry (99a, 284a-240a).[66] Again, commencing on October 12, 1971, also pursuant to Section 21(a) of the Exchange Act, the Commission held further public hearings on the structure of the securities markets. Interested persons appeared and presented their views with respect to various interrelated matters concerning the appropriateness of modifications to the structure of the securities markets.[67] Upon conclusion

[66] The Commission announced the commencement of these hearings on May 28, 1968. See Securities Exchange Act Release No. 8324 (1968) (286a-287a). These hearings, which were conducted through the summer of 1971, were intended to elicit information on, among other things, how the securities industry worked and whether "a minimum exchange commission rate structure is necessary" to the operation of the securities industry. *Id.*

[67] In Securities Exchange Act Release No. 9315 (August 26, 1971) the Commission announced that the following matters were to be considered during the hearings:

"(1) The desirability, structure and means of developing a national system of securities exchanges and the relationship of such a system to other securities markets;

"(2) So-called 'institutional membership' on exchanges including (i) exchange membership by financial institutions (such as insurance companies, trust companies, foundations, investment companies and pension funds); (ii) exchange membership by affiliates of financial institutions such as their investment advisers, managers, parents, subsidiaries or other affiliates, who may utilize such memberships either to execute portfolio transactions for an institutional affiliate or in one way or another to facilitate the recapture of commissions by an institution or to conduct a general securities business as an exchange member, or any combination of the foregoing; (iii) exchange membership by other organizations whose primary business may not be that of a broker or dealer or their affiliates; (iv) whether and the conditions under which any of the foregoing persons should be permitted to engage in the business of a broker or dealer in securities (aside from acting as underwriters for the shares of one or more investment companies);

of these hearings, and following publication in 1971 of a second Congressionally-mandated study of the securities markets by the Commission—*The Institutional Investor Study,* H.R. Doc. No. 92-64, 92d Cong., 1st Sess.—the Commission issued a *Statement on the Future Structure of the Securities Markets* (February 2, 1972) (hereinafter cited as "Policy Statement"), in which it enunciated its commitment to the creation of a central market system in listed securities (239a).

In the Policy Statement, the Commission noted that one of the major barriers to the central market system was the fixed minimum brokerage commissions. Policy Statement, p. 15 (385a-386a).[68] Nevertheless, the Com-

"(3) Restrictions on access of non-members to exchange markets and of exchange members to the third markets;

"(4) The reasons for differing regulation of securities markets and the kind of additional or modified regulation, if any, which may be needed;

"(5) The need for additional disclosure of information on prices, volume and quotations in all markets, and the nature thereof through a composite tape or otherwise, and

"(6) Competition among exchange and between exchanges and other markets."

[68] The Commission observed that fixed minimums may not only have been at an unreasonable level, but also may have caused the serious side effects of

"(a) Dispersion of trading in listed securities

(b) Reciprocal practices of various kinds.

(c) Increasing pressure for exchange membership by institutions."

Policy Statement, p. 15 (385a). These side effects, the Commission stated, were obstacles to the central market system in that they cause

"certain markets and market makers . . . to choose to stay outside the system in order to compete in service charges as well as in execution, as the third market does, or in order to compete, as certain regional exchange do, for institutional business by directly or indirectly providing institutions with rebates of commissions." *Id.*

mission observed that "we are dealing with an industry which has operated under fixed commission rates for a very long time." *Id.* (386a). Consequently, while the Commission expected that the goals of "competitive rates and the creation of a centralized market system" would have desirable incidents, it was at the same time concerned that competitive rates might result in

> "deterioration in standards of service and responsibility or . . . higher transaction costs owing to increased spreads and fluctuations, or [the possibility that] . . . investment managers [will make] . . . visible commission cost an exclusive criterion in deciding where to place their executions and [thus ignore] . . . through carelessness or fear of criticism, the elements of skill, knowledge, judgment and advice."

Id. at p. 14 (384a).

In the Commission's view, "[a]ny changes in the commission structure should not reverse" the ongoing process of upgrading broker-dealer "standards of service to the public including the provision of adequate information, advice, care and responsibility." *Id.* at pp. 15-16 (386a). Thus, the Commission concluded that "[i]t is necessary to measure the effect of competitively determined commissions very carefully on a step-by-step basis." *Id.* at p. 15 (386a). While "[t]he principal argument in favor [o]f fixed minimum commissions is the severe decline in the revenue of the securities industry predicted to result if competitive rates were suddenly introduced on all institutional business," it was the Commission's opinion that the indus-

try should be able to adjust to the introduction of competitive rates, "at least on large orders, at a measured deliberate pace." *Id.* at p. 16 (387a).[69]

These views reflected a reaffirmation of conclusions that the Commission had earlier reached "that fixed minimum commissions on institutional size orders are neither necessary nor appropriate" (351a, 353a).[70]

[69] The Commission's letter, transmitting the Institutional Investor Study to the Congress, stated:

"We have . . . taken initial steps to require competitive rates . . . which we believe will have ameliorating effects on future developments in a number of the areas studied. Assuming that the step called for is timely implemented by the . . . [NYSE], the Commission's subsequent steps in this and related areas must necessarily be guided to a considerable extent by its experience with the initial step. . . . In this situation we believe the sound regulatory course is to proceed with caution on any further concrete recommendations concerning the structure of the securities markets" (footnote omitted).

Securities and Exchange Commission, *Institutional Investor Study*, H.R. Doc. No. 92-64, 92nd Cong., 1st Sess., Pt. 1, pp. vii-viii.

The Commission's approach of a phased introduction of competitive rates has been endorsed in Subcommittee on Securities, Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess., *Securities Industry Study*, p. 60 (Committee Print), in Subcommittee on Securities, Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess., *Securities Industry Study*, at p. 62. (Committee Print); and in United States Department of the Treasury, *Public Policy for American Capital Markets*, p. 6 (1974).

[70] The Commission's reservation concerning the exchanges' fixed minimum commission rate system as it related to large trades dates back to the Special Study of 1963. See Special Study, pp. 328-351. In the Special Study it was noted that since the commission rate structure of the exchanges allowed no discount for large volume trades, although the cost per share to the broker effecting such transactions was significantly less than for smaller volume trades, certain practices occurred. *Id.* Among these were the execution of large trades off the exchanges in order to take advantage of

Thus, on October 22, 1970, the Commission had taken a position in a letter to the NYSE that fixed minimum commission rates "for that portion of orders in excess of $100,000" were unreasonable. Securities Exchange Act Release No. 9007 (1970) (384a).[71] The Commission later determined "not [to] object to the . . . [NYSE's] commencing competitive rates on portions of orders above a level not higher than $500,000 rather than the $100,000 figure . . . ," but insisted that this be done by April 10, 1971 (353a-354a). Most exchanges had implemented competitive commission rates above that level by April 5, 1971. Securities Exchange Act Release No. 9148 (April 14, 1971).

Thereafter, the Commission observed the effect of negotiated rates above $500,000.[72] Having done so, the

discounts derived from the economies of size and the practice by exchange members of making unauthorized reciprocal payments at the direction of persons who channeled large trades to the exchange member. *Id.* See also 219a-220a.

For a period after the Special Study, the Commission's staff and representatives of the exchanges met to discuss implementing the recommendation of the Special Study that these practices be curbed (44a-45a). Then, in 1968, the Commission took direct steps to relieve the problems by requesting the exchanges to integrate into their commission rate system a volume discount or alternatively to eliminate minimum commissions on portions of orders above $50,000 (46a).

[71] The Commission's conclusion that it was unreasonable for securities exchanges to prescribe fixed rates on portions of orders above $100,000 was conveyed to the exchanges as part of a letter to the NYSE. The letter was intended to advise the NYSE of those aspects of a new increased commission rate schedule prepared by the NYSE which the Commission found not to be reasonable. The NYSE's new schedule originated as an interim surcharge that the NYSE sought to place on small orders in order to compensate for severe financial conditions which its members suffered in 1969-1970.

[72] In its letter of October 22, 1970 to the NYSE (see p. 67

Commission concluded in its February 1972 Policy Statement that while

> "further reductions in the breakpoint [*i.e.*, the transaction size above which rates must be negotiated] might have a more severe impact on the income of certain kinds of member firms, on the services they provide, on their role in the capital markets, including the distribution of securities,

supra) the Commission had requested the exchange to submit no later than June 30, 1971, a "new rate schedule of scaled percentage charges based upon the amount involved in an order" (352a). On April 14, 1971, the Commission informed the securities industry that any further reduction of the negotiated rate breakpoint would be deferred pending the submission expected from the NYSE on June 30, 1971. Securities Exchange Act Release No. 9148 (April 14, 1971). The Commission intended:

> "to observe the workings of competitive commission rates on orders in excess of $500,000 to consider carefully all questions which arise as a result thereof."

Id.

In September 1971, after receipt and analysis of the submissions and the public comments thereon, the Commission announced that it was not disposed at that time to lower further the breakpoint to a level below $500,000, but would continue to

> "study the economic and regulatory impact on the investing public, the securities markets and the securities industry of competitive commission rates on portions of orders in excess of $500,000."

Securities Exchange Act Release No. 9351 (September 24, 1971). (Doc. App. 158) The Commission advised the NYSE that since "a rule dealing with commission rates is necessarily dependent for its validity upon the continuation of the conditions and circumstances justifying the reasonableness of the rates" the NYSE should continue to "review its commission rate structure," "gather necessary data from its members" and submit any modifications or changes in its commission rate structure to the Commission "to enable [the Commission] to exercise its continuing regulatory oversight." *Id*, (Doc. App. 157).

> and on the desires of institutions and their managers to recapture commissions or otherwise use them for their benefit,"

it would nevertheless be appropriate for a $300,000 breakpoint to take effect in April of 1972. Policy Statement, p. 16 (387a, 401a).

On May 31, 1973, in response to severe financial conditions in the securities brokerage industry, the NYSE submitted to the Commission proposed amendments to its constitution and rules which would result in an increase in the commissions charged by NYSE members (Doc. App. 24). Shortly thereafter—on June 6, 1973—the Commission commenced "a public investigatory hearing . . . to consider whether any changes should be made in the rules, policies, practices and procedures of one or more registered national securities exchanges respecting commission rate schedules" Securities Exchange Act Release No. 10206. (Doc. App. 24). On September 11, 1973, the Commission publicly announced its "conclusions concerning the commission rate proposals of the . . . [NYSE]. . . ." (Doc. App. 27). The Commission concluded that it would not object if the NYSE should immediately adopt its proposed commission rate increases, effective through March 31, 1974. The Commission further concluded that it would not object to the continuation of those increases from April 1, 1974, through April 30, 1975, subject to the condition that the NYSE first adopt certain other rules to become effective by or before April 1, 1974.[73] The

[73] Specifically, the Commission's conclusion not to object to the continuation of the increase after April 1, was conditioned upon the adoption of rules to "(a) eliminate that portion of NYSE Rule 383

Commission stated in its announcement, however, that "it will act promptly to terminate the fixing of commission rates by stock exchanges after April 30, 1975, if the stock exchanges do not adopt rule changes achieving that result." (Doc. App. 28). The Commission further concluded that it would "not initiate in April 1974, a breakpoint reduction below $300,000 respecting the portion of orders above which rates may be competitively determined," Securities Exchange Act Release No. 10383 (Doc. App. 28).

Subsequently, in a letter from the Commission to the NYSE, dated December 14, 1973 (Securities Exchange Act Release No. 10560; Doc. App. 29), the Commission explained that in view of the fact that in the Exchange Act "rules concerning exchange-required fixed commission rates [were matters] that Congress entrusted to the exchanges in the first instance, at least as long as the fixing of commission rates should be permitted, the Commission after having considered a number of factors, "could not conclude that the NYSE's rate proposal was unreasonable" (Doc. App. 32-33). Accordingly, the Commission was "motivated . . . to raise no objection to the NYSE's rate increase for the period ending March 31, 1974" (Doc. App. 36).

The Commission also explained that its

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prohibiting member firms from charging their customers commission rates exceeding the NYSE's commission rate schedules and (b) [to] permit, but . . . not require, member firms to provide less than a full range of brokerage services presently furnished customers in return for a discount of up to 10 percent from the commission rate schedule . . . [that had been proposed by the NYSE]" (Doc. App. 28).

"conclusion that it would be appropriate to require exchanges to eliminate fixed rates effective by April 30, 1975, of course, also had some influence on its conclusion not to object to the specific rate proposed by the NYSE" (Doc. App. 36).

The Commission reasserted that

> "the long history of fixed rates argues against a precipitous elimination of the fixed rate system. It is appropriate, for the protection of investors and in the public interest, that stock exchange firms be given an opportunity to develop business strategies and adjust their operations to a competitive-rate environment. It is not appropriate to risk the possibility that undue haste might threaten the ability of the industry to fulfill its essential function of serving the needs of investors and corporations seeking capital from the public. The severe financial experience of the member firm community in the last half of 1972 and the first seven months of 1973 indicated that, without some form of rate increase, the ability of the industry to function would be impaired at the very time that it was expected to accomplish a transition to a competitive rate system (in a relatively short period of time), as well as the implementation of an extremely large number of other regulatory initiatives of a significant nature." (Doc. App. 37).

The Commission further stated that, while it would not necessarily require the NYSE, as a condition to continuing the rate increase after April 1, 1974, to adopt a rule allowing customers a 10% discount from

the fixed rate for reduced services from their broker,"[74] it adhered to the objective reflected in its September 11, 1973 conclusions "that the exchanges take steps to effect a meaningful experimental period prior to the introduction of completely unfixed rates. . . ." (Doc. App. 39). The Commission explained that with the "limited price competition [it expected] . . . all exchanges will effect," a broader range of investors would "have the opportunity to react to" competitive rates than would result from simply lowering the competitive-rate breakpoint below $300,000. (Doc. App. 40) Accordingly, the Commission determined that it would not be necessary to lower the breakpoint in April of 1974.

In response to the Commission's reaffirmation of its objective to provide for a meaningful experimental period, the NYSE submitted to the Commission proposed amendments to its constitution and rules to allow for competitively-determined commission rates on public orders of $2,000 or less commencing on April 1, 1974 (Securities Exchange Act Release No. 10670. Doc. App. 42). The NYSE's proposed rule changes did not provide, however, that intra-members rates on portions of orders of $2,000 or less be competitively determined. The Commission decided not to raise any objection to these rule changes but conditioned its non-objection on the expectation that the exchanges will "promptly . . . implement any necessary rule and constitution changes" if "the Commission determines, as a result of its study of the matter, that exchange ex-

[74] See note 73, *supra*.

periments with limited price competition should be broadened to encompass intra-member rates" (Doc. App. 44)."[75]

Following the Commission's hearings on intra-member rates, the Commission announced on September 19, 1974, that it had written to the presidents of each registered securities exchange stating (1) that in its view ample opportunity had been provided exchange members "to develop business strategies for, and to adjust their operations to, an unfixed rate environment"; (2) that it was "not persuaded, on the basis of the data and views obtained as a result of [the intra-member rate hearings] that its policy conclusions of September 11, 1973, should not also be applicable to intra-member rates," and (3) that the exchanges were formally requested, pursuant to the Commission's authority vested "under the Securities Exchange Act and particularly Sections 2, 6, 10, 11, 19 and 23 thereunder", to "effect necessary changes in their constitution, rules, and practices" to eliminate fixed rates "effective on or before May 1, 1975." Securities Exchange Act Release No. 11019 (September 19, 1974) (Doc. App. 60-64).

[75] In order to aid its study of the matter, the Commission, on April 23, 1974, announced the commencement of public investigatory hearings beginning on May 29, 1974

> "to gather comments, views and data concerning whether the initiation in the near future of a limited experiment in competitive intra-member rates of commissions on orders not exceeding $2,000 would cause substantial and irreparable harm to floor brokers or to the market-making function of specialists, and whether it is necessary or appropriate in the public interest or for the protection of investors for exchanges to maintain any prescribed schedules of intra-member rates of commission" Securities Exchange Act Release No. 10751 (Doc. App. 49).

As a result of responses received by the Commission with respect to its September 19 request, the Commission determined to publish for comment, on October 24, 1974, proposed Rules 19b-3 and 10b-22 which would prohibit exchange rules fixing commission rates and establish procedures to regulate agreements to fix commissions on exchanges. Securities Exchange Act Release No. 11073 (October 24, 1974) (Doc. App. 65). The Commission also announced that it would hold hearings, beginning on November 19, 1974 with respect to its proposed rules. *Id.*"[76]

Following hearings on its proposed rules [77] the Commission announced on January 23, 1975, adoption of Rule 19b-3, proscribing exchange rules or practices fixing commission rates as of May 1, 1975.[78] Securities

[76] In Securities Exchange Act Release No. 11093 (November 8, 1974), the Commission provided, in anticipation of its hearings, a synopsis of the Commission's extensive regulation of fixed rates since 1963. (Doc. App. 81).

[77] The Antitrust Division of the Justice Department submitted a memorandum in these hearings in which it asserted that "the thrust of the [Exchange Act] is to authorize the Commission to take such remedial or reform actions with respect to exchange practices as the Commission deemed necessary or appropriate to effectuate the purposes of the Act"; and as a result, the Commission may "prohibit the exchanges and their members from fixing commission rates." Comments of the United States Department of Justice, Proposal to Adopt Securities Exchange Act Rules 19b-3 and 10b-22, Securities Exchange Act File No. 4-176 (December 10, 1974), pp. 6-7. Apparently the Department of Justice believes that the powers granted to the Commission in Section 19(b)(9) to regulate the fixing of "reasonable rates of commission" gives the Commission the authority to *abolish* fixed commission rates but *no* power to authorize any level of fixed rates.

[78] Rule 19b-3 provides:

(a) No national securities exchange ("exchange") shall adopt or retain any rule of the exchange that requires, or shall otherwise, directly or indirectly, require its members, or any person associated with its members, to charge any person any fixed rate of commission for transactions effected on, or effected by the use of the facilities of, such exchange.

(b) Each exchange shall provide in its rules of the exchange that nothing therein or in its practices shall be construed to require or authorize its members, or any person associated with its members, to agree or arrange, directly or indirectly, for the charging of fixed rates of commission for transactions effected on, or effected by the use of the facilities of, such exchange.

(c) No member of any exchange, or person associated with any member, shall be required to comply with, or may rely on, the provisions of any rule of the exchange covered by paragraph (a) of this rule.

(d) As used in this rule, the term "rule of the exchange" refers to any provision of the constitution, articles of incorporation, bylaws or rules or instruments corresponding thereto, whatever the name, of the exchange, and the term "floor brokerage commissions" refers to commissions applicable to the execution of transactions for members or associate members of an exchange but does not include commissions for clearance services or commissions for combinations of floor brokerage and clearance services.

(e) The provisions of this rule shall become effective on May 1, 1975, except as to any rule of the exchange relating to floor brokerage commissions as to which the provisions of this rule shall become effective on May 1, 1976.

Exchange Act Release No. 11203 (January 23, 1975) (Doc. App. 109). In its release announcing adoption of Rule 19b-3 the Commission explained:

"The basic reason for the Commission's decision to adopt Rule 19b-3 was the conclusion that, under present circumstances, the free play of competition can provide a level and structure of commission rates which will better serve the interests of the investing public, the securities markets, the securities industry, the national economy and the

public interest than any system of price fixing which can reasonably be devised. . . . It should be emphasized, however, that the Commission's conclusions are not based upon any simplistic notion that competition is a "good thing" in all lines of endeavor, including a regulated industry, and that, therefore, competitive rates should be substituted regardless of experience and circumstances. Rather, this conclusion is based upon the entire experience of the Commission and the securities industry with fixed rates, particularly during the last decade and more, and the intensive studies which have been made of that subject by so many competent persons." *Id.* at pp. 24-25 (Footnote omitted) (Doc. App. 133-134).

The Commission specifically cautioned, however, that its adoption of Rule 19b-3

> "does not reflect any judgment by the Commission that the fixed commission rate always was bad or that it was, or now is, illegal, or that fixed commissions could never be appropriate in the future. Rather, it simply reflects a conclusion, based upon the Commission's experience and the abundant data alluded to [in] its release that, under the conditions now existing, fixed minimum commissions should terminate at the times specified in the rule. It is not possible to predict future developments or future conditions, and it is conceivable that unforeseen developments could require the Commission to reinstitute some form of fixed rates, although the Commission does not anticipate or believe that this will become necessary."

Id. at p. 26 (Doc. App. 136-137)."[79]

The Commission's program since 1968 of modifying the exchanges' fixed rate structure has been paralleled by related Commission initiatives which affected the exchanges' commission rate structure as it related to the proposed central market system. One of these initiatives was a program to provide non-member broker-dealers with greater access to the exchange market while fixed rates continued on the exchanges.[80]

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[79] Because the Commission recognized (1) "that the transition to competitive public rates will create problems of adjustment and accommodation for the exchanges and a deferral of the change as to floor brokerage rates may facilitate the ability of the exchanges to accomplish a smooth transition to a new environment"; (2) that certain exchange members apparently did not realize that the Commission's September 11, 1973 conclusions were applicable to floor brokerage rates as well as non-member rates, and thus "may not have had the benefit of the advance notice and time for planning with respect to floor brokerage rates which the September 11th notice was intended to provide"; and (3) that "floor brokerage rates have considerably less impact on public investors than do public rates," it concluded that the date for elimination of floor brokerage rates should be May 1, 1976, instead of May 1, 1975. *Id.* at pp. 1-2 (Doc. App. 110).

[80] The NYSE, until the implementation of the Commission's program in this area, prohibited its members from splitting commissions for transactions executed on the NYSE. The AMEX had a similar prohibition. These prohibitions, known as anti-rebate rules, were intended to preserve the integrity of the exchanges' fixed minimum commission rate system. See *Thill* v. *New York Stock Exchange, Inc., supra,* 433 F. 2d 267.

The October 22, 1970, letter in which the Commission first requested that the NYSE adopt competitively-established commissions above certain levels (see *supra,* p. 67) (352a), also instructed the NYSE to submit, no later than June 30, 1971, a plan that would, provide "for reasonable economic access to the New York Stock Exchange for non-member broker-dealers." Such a program would of course, provide non-members with a means of participating in the exchange market at rates below the otherwise applicable

A second action taken by the Commission, which relates to the fixed minimum commission rate system, was the Commission's promulgation on January 16, 1973, of Rule 19b-2 under the Exchange Act, 17 CFR 240.19b-2. The rule is intended to limit the use of exchange memberships for other than public purposes. Securities Exchange Act Release No. 9950 (January 16, 1973).[81]

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minimum commission rates. Thus, the Commission's request for a plan of non-member access, like its decision to implement negotiated rates at certain levels, reflected its conclusion that the commission rate structure, as it had been applied, was no longer necessary or appropriate under the standards contained in Section 19(b). But just as the Commission had been concerned that a precipitous leap to fully negotiated rates might have a calamitous impact upon the securities markets, it took steps to assure that changes in access for brokers would provide meaningful profits from stock exchange transactions executed for their customers, and that such changes would not occur at the expense of the stock-exchange-member sector of the securities industry. Consequently, when the NYSE in mid-1971, submitted a proposal allowing non-members a discount of 30 percent from the public rate (Doc. App. 159), the Commission insisted that

> "the discount afforded non-member broker-dealers should not be less than 40% to allow for a minimum meaningful test of this proposal" Securities Exchange Act Release No. 8324, (Doc. App. 149).

A 40 percent discount for non-members went into effect in late March of 1972.

[81] In announcing Rule 19b-2's adoption, the Commission noted that the rule satisfied several objectives, including

> "The need to structure a central market system, the need to eliminate unfair trading advantages, the need to restore and insure investor confidence in our trading markets, the need to foster meaningful competition in the securities industry, and the need to promote the orderly introduction of competitive commission rates on large-size securities transactions. . . ."

Id. at p. 188. Regulation of the use of exchange memberships was found to be necessary to implement the Commission's program of

Finally, in its recent release announcing the adoption of Rule 19b-3 the Commission addressed itself to another problem related to the problems of non-member access to exchanges and institutional membership on exchanges—namely, the question of whether the elimination of fixed rates would reduce economic incentives to retaining exchange membership.[82]

The foregoing makes clear that the Commission has since 1961 been engaged in a continuing regulatory program which has sought to examine fully the nature and effect of the national securities exchanges' fixed rate system, and which has sought to structure the exchanges' operations not only with respect to the commission rates themselves but also with respect to a myriad of interrelated and interdependent matters. It

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introduction of competitive rates because the use of exchange membership by institutions for the purpose of recapturing brokerage commissions "would be tantamount to competitive rates (or no commissions at all) on all size orders for those institutions immediately" as a result of which "the Commission's phase-in-program would . . . become an academic exercise, at best." *Id.* at p. 107.

[82] The Commission stated that while "these concerns appear exaggerated" and do "not provide an adequate basis for deferring competitive rates" since they can be dealt with in other ways, nevertheless

> "[i]f it should appear that member firms are proposing to leave the exchanges in order to execute customers' transactions by making markets off the exchange, various steps could be taken to restrict this practice to the extent necessary or appropriate in the public interest or for the protection of investors."

Securities Exchange Act Release No. 11203, p. 43 (Doc. App. 154). In this connection, however, the Commission specifically cautioned that while it intended to receive comments on this problem

> "proposals which appear on their face to be anticompetitive can hardly be acted upon in the absence of experience under competitive rates which demonstrates that they are, nevertheless, necessary or appropriate" *Id.* (Doc App. 155).

is hard to conceive of a better example to demonstrate the necessity for entrusting exchange operations to an administrative agency with continuous supervisory jurisdiction, rather than to the *ad hoc* jurisdiction of antitrust courts.[83]

CONCLUSION

In adopting the Securities Exchange Act of 1934, Congress intended to establish a national policy for the regulation of transactions on securities exchanges. To accomplish this goal, the Commission was vested with

[83] In order to carry out its broad regulatory responsibility over the exchange markets the Commission has an entire division consisting of 117 full time employees, its Division of Market Regulation, devoted to the development and implementation of regulatory policies and programs, as well as dozens of other staff personnel employed in other offices and divisions.

Not only does the record of Commission action with respect to commission rates illustrate the wisdom of Congress in delegating to the Commission quasi-legislative jurisdiction over the exchanges' rate structure, but the history of active exercise of Commission authority also requires that the exchanges' present rate structure be found immune from antitrust attack, even if this Court were to hold that the fact of jurisdiction by the Commission over the exchanges' fixed commission rate system alone does not afford such immunity.

The commission rate system existing at the time of the institution of this action, as well as the present system, is the product of the Commission's ongoing supervision. In the course of exercising this authority, the Commission determined that any precipitous move toward fully negotiated rates was not appropriate, but rather that the elimination of fixed rates at various levels should be the product of a deliberate, considered administrative program. It is just this type of action by a regulatory agency which this Court has held displaces the antitrust laws. *See Hughes Tool Co.* v. *Trans World Airlines, Inc., supra,* 409 U.S. 237. To allow an antitrust attack in this case "would disrupt" the Commission's delicate regulatory scheme, and would throw existing rate structures out of balance." *United States* v. *Radio Corporation of America, supra,* 358 U.S, at 348.

"broad powers over the exchanges to insure their efficient and honest functioning." [84]

But, creation of a scheme of regulation embodied in the Exchange Act did not take place in a vacuum. Rather, Congress appropriately took into consideration practices that had evolved over nearly 150 years of exchange operations without government regulation. As a result, in order to preserve the initiative and imagination of the exchanges already in existence, as well as to spur the exchanges to develop ethical and legal standards for the governance of the daily business conduct of their members, the Exchange Act explicitly contemplated that registered exchanges would be able to propose new regulatory standards and reevaluate their existing requirements. To oversee this "statutorily imposed duty of self-regulation" [85] the Commission was provided with continuous and complete regulatory control of the exchange mechanism through direct authority to adopt its own rules concerning specific areas of conduct of exchanges and their members and by the sweeping provisions of Section 19(b) empowering the Commission to alter, modify, repeal or amend exchange rules governing "any important matter." [86]

For nearly fifteen years the Commission has used its assortment of regulatory tools, whether formal, informal, or a mixture of both, to develop a cohesive policy with respect to the structure and functioning of the securities markets, a structure which in large measure had been shaped and affected by the rules of

[84] H.R. Rep. No. 1383, *supra,* p. 14.

[85] *Silver* v. *New York Stock Exchange, supra,* 373 U.S. at 353.

[86] H.R. Rep. No. 1383, *supra,* at p. 15.

exchanges requiring their members to charge the public fixed rates on exchange transactions.

What is at stake in the instant case, however, is not the Commission's substantive decision to eliminate the practice of fixed rates. None of the parties to this lawsuit formally disputes the propriety of such a conclusion under present circumstances. What is at stake is whether the governmental agency vested with continuing policy-making jurisdiction shall be permitted to establish national policy for the regulation of our nation's securities markets—"regulatory work for which [the Commission] was constituted . . . [and] which cries out for some rational plan" [87]—or whether that complex and delicate task shall be exercised through *ad hoc* decisions by the hundreds of district courts across this country.

But for the fact that not all of the determinations made by the Commission took the form of formal orders, the Department of Justice apparently would concur (DOJ Br. p. 48) that it is the Commission that should perform that policy-making function. The Department's limited concession, however, exalts form over substance. The Commission's authority to regulate the conduct of exchanges concerning commission rates is continuous and complete; it is the Commission, therefore, and not the antitrust courts, that most appropriately should serve as the "balance wheel," referred to by this Court in *Silver*,[88] to insure that, in

[87] *Stark* v. *New York Stock Exchange, Inc., supra*, 346 F. Supp. at 228.

[88] 373 U.S. at 367.

evaluating the conduct of exchanges, the public interest is fully and adequately protected.

The policy articulated by the Commission to eliminate fixed exchange commission rates was derived both from the cooperative relationship Congress intended the Commission to have with the exchanges, and from the contribution of views from interested members of the public, the Department of Justice, and others. Only by sustaining the decision of the court below can it be insured that the "partnership between government and private enterprise that marks the design of the Securities Exchange Act of 1934 can operate effectively . . . in the long run." [89]

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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MARCH 1975.

I authorize the filing of this brief.

ROBERT H. BORK,
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[89] *Silver* v. *New York Stock Exchange, supra*, 373 U.S. at 366.

APPENDIX

The pertinent provisions of the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. 78a, *et seq.*, are as follows:

NECESSITY FOR REGULATION AS PROVIDED IN THIS TITLE

SECTION 2. For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchange and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:

(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of inter-

state commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the

effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.

* * * * *

TRANSACTIONS ON UNREGISTERED EXCHANGES

SECTION 5. It shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange within or subject to the jurisdiction of the United States to effect any transaction in a security, or to report any such transaction, unless such exchange (1) is registered as a national securities exchange under section 6 of this title, or (2) is exempted from such registration upon application by the exchange because, in the opinion of the Commission, by reason of the limited volume of transactions effected on such exchange, it is not practicable and not necessary or appropriate in the public interest or for the

protection of investors to require such registration.

REGISTRATION OF NATIONAL SECURITIES EXCHANGES

SECTION 6. (a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this title, and any amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules of procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are herein-

after collectively referred to as the "rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member of conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this title and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as

a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.

* * * * *

POWERS WITH RESPECT TO EXCHANGES AND SECURITIES

SECTION 19. (a) The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—

(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this title or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon.

(2) After appropriate notice and opportunity for hearing, by order to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to withdraw, the registration of a security if the Commission finds that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder.

(3) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a national securities exchange any member or officer thereof whom the Commission finds has violated any provision of this title or the rules and regulations thereunder, or has effected any transaction for any other person who, he has reason to believe, is violating in respect of such transaction any provision of this title or the rules and regulations thereunder.

(4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission

determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

(c) The Commission is authorized and directed to make a study and investigation of the rules of national securities exchanges with respect to the classification of members, the methods of election of officers and committees to insure a fair representation of the membership, and the suspension, expulsion, and disciplining of members of such exchanges. The Commission shall report to the Congress on or before January 3, 1935, the results of its investigation, together with its recommendations.

* * * * *

The pertinent provisions of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et. seq.* are as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be

deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The pertinent provisions of the Clayton Act, 38 Stat. 731, 737, 15 U.S.C. 15, 26, are as follows:

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *

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